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BY

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AND

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"Δεῖ καὶ τὰς ἄλλας ἐπισκέψασθαι πολιτείας . . . ἵνα τό τ'ὀρθῶς ἔχον ὀφθῇ καὶ τὸ χρήσιμον."—Arist. *Pol.* II. 1.

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THE RT. HON. LORD ROBERT CECIL, K.C., M.P.

[*Contributed by* the Rt. Hon. Sir W. H. DICKINSON, K.B.E.]

THOUGH reared in an atmosphere of aristocracy, Lord Robert Cecil is a democrat. Not one by instinct or by predilection—he probably regards democracy as a very poor engine of national government —but by an intelligent appreciation of the facts of to-day. Hence he is quite prepared to appeal to the people, and to rely upon the sober opinion of the British race to choose its leaders from the educated classes. Nor is he afraid to extend the principle of democracy to its full extent. He readily accepted Women's Suffrage, and made himself the protagonist of that movement in the Tory Party. It was largely through his efforts that the limited franchise in the Representation of the People Act was rendered possible, and he has led in the effort to achieve complete political equality of men and women.

Whilst Lord Robert Cecil would, no doubt, resent being dubbed a "Radical," his mind is singularly open to the ideals of the most advanced Reformers. He was one of the earliest of his party to accept the proposition of those who, very early in the war, were advocating the establishment of a League of Nations. Even when that movement was at its most unpopular stage and its supporters were represented as being little less than traitors to their country, Lord Robert Cecil identified himself with it, and in his position as Under-Secretary of Foreign Affairs set on foot the departmental investigations which enabled the British Government to take a leading part in the deliberations of the League of Nations Commission at the Peace Conference. The League of Nations Covenant is the outcome of the forethought and determination of three men, M. Léon Bourgeois, President Wilson and Lord Robert Cecil. The first-named statesman had been a life-long advocate of international arbitration, a member of the Hague Conferences, and at one time Prime Minister of France. He had persuaded M. Clemenceau

to appoint a Commission to study the subject of a League of Nations over whose deliberations he presided, and on whose behalf he drew up a most valuable report. President Wilson had come to France furnished with the results of careful enquiries conducted by his most capable assistants and resolved at all hazards to bring out of the welter of the war some permanent international organisation that would save humanity from a repetition of its horrors. But the views of France and America differed widely, as was natural under the circumstances. France, with possible enemies at her gates, liable to be invaded at a moment's notice, wished to have a League of Nations that could act as rapidly as a policeman in the street stops a row by instant intervention. America, on the contrary, dreads being dragged needlessly and wthout time for reflection into European disputes ; and so, between two views as to the functions of a League of Nations, a middle course had to be discovered. It was here that the influence of Lord Robert Cecil was of value. The project submitted by the British Government had been framed with a knowledge of each of these points of view, and the scheme ultimately adopted bestows on the Council of the League the power to act, whilst it gives to America and to each of the other lands represented on that Council an individual right to restrain such action. This is the reason for, and the value of, the provision requiring unanimity in the Council, to which many people have directed hostile criticism. The inclusion of this particular provision in the covenant was largely, if not solely, due to Lord Robert Cecil's insistence.

The League of Nations Covenant is a *fait accompli* ; but the League itself is as yet far from being a living force in the world, and those who have laboured to bring it to birth have now to see that it grows safely to man's proportions. Lord Robert Cecil has been among the first to realise this fact, and also to recognise that it will be from the democracy of the world that the League must draw its inspiration and its strength. He has, therefore, thrown himself heart and soul into the work of popularising the League and enabling the common folk to understand its value and uphold its authority. As Chairman of the Executive of the " League of Nations Union," he not only directs this movement at home, but also, by association with kindred societies in other lands, he strives to draw together all those who are willing to rally to the flag of peace.

ADOPTION.

[*Contributed by* Sir Alfred Hopkinson, K.C.]

It is a curious fact that neither English nor Scots law recognises or makes any provision for adoption in the full sense of the term, that is the creation by agreement of parties, with the sanction of the State, of a relationship between them which gives rise to rights and duties similar to those which subsist between natural parents and their children. This defect in the law has been noticed from time to time, and practical inconveniences have arisen from it. New conditions due to the war have now given increased importance to the question. It is one that demands careful immediate consideration at the present time on several grounds.

The Present Need.—First, there are a large number of fatherless children unprovided for, who might find some compensation for the loss of a father's care if a relative or some suitable stranger adopted them, gave them a home, and provided for their education and for starting them in life. Secondly, there are many homes now desolate by the loss of sons, where the father and mother of those who are gone might find some consolation by taking into their care, helping, training, and providing for some child or children whom they would come to regard with growing affection, almost as their own offspring. Thirdly, owing to the terrible mortality among young men, there are now and will for some time be an increased number of women who will never be able to marry, and of childless widows who have lost their husbands in the war. The strongest desire in many of the best women is to have some one whom they may care for, train, and guide. They have a maternal instinct which cannot be satisfied now by their having children of their own, and this feeling might find some partial satisfaction, and scope for a woman's highest work might be given, if they could adopt some child for whom such motherly care would otherwise be lacking.

It is no sufficient answer to say that private arrangements may

be made. Some more definite legal recognition is required, both to safeguard the interests of the children on the one hand, and on the other to secure that those who have in fact brought them up—who have placed themselves *in loco parentis*—shall not be deprived of them except for some good reason affecting the welfare of the children. These considerations apply, no doubt, most clearly in the case of those who are fairly well to do, but the importance of recognising adoption by law is felt, not only in cases where the adoptive parent is able to maintain and provide for adopted children until they grow up, but also among the working classes. There are manufacturing districts where it is not uncommon for relatives or neighbours to take into their families children who are neglected by their parents. Such children are cared for and maintained by those who have kindly saved them from parents who have ill-treated or deserted them, until the age of twelve or fourteen, when it has been customary for them to go into factories—often as half-timers—and begin to bring in wages which help towards the household expenditure. The parents, then considering them to have a marketable value, have claimed to take them back, simply to get the benefit of their wages.

Adoption in Other Lands.—It is well to recognise that the introduction of any regular law as to adoption involves many difficulties. Questions of policy will have to be considered upon which opinions may differ widely. There are many legal reforms which could easily be carried into effect by some simple Act of Parliament—such an Act as any competent draftsman might settle in a few hours—but adoption is not one of these.

It will also be found that although the practice of adoption has prevailed from time immemorial, both in the East and in the West, and has been recognised and regulated by law, it has been based originally on customs and on social conditions which differ *toto cælo* from those which exist now in this country. The laws of other countries on the subject are no doubt a very interesting study, but generally they will not be of much use as a practical guide in legislation, though some useful suggestions as to the points to be considered, and the mode of dealing with them, will be found in some modern codes. It is not possible here to give more than the results of a very cursory examination of some of the more important systems of law in which adoption is recognised.

India.—In India the practice of adoption is general, and is one of the most fruitful sources of litigation. "The probability is that a sonless Hindu will contemplate adoption" and "the effect that every adoption must have on the devolution of property causes every case that can be disputed to be brought into Court." The Privy Council is constantly having to solve knotty problems on the subject arising on appeals from the Indian Courts. The law is based on customs which vary in different parts of the country, and among different classes, and on ideas which differ entirely from those of Western nations. How difficult it is to give any accurate and clear account of the Indian law on adoption may be gathered from the chapters on the subject in so able and learned a work as Mayne's *Commentaries*. They are quite sufficient to deter any one without prolonged study and great experience from attempting the task.

Roman Law.—The Roman law of adoption, on the other hand, was fairly well defined and uniform, and no doubt it has had some influence on that of modern Europe on the subject. It is worth special notice that from the earliest to the latest times some intervention on behalf of the State and official sanction was required to give legal effect to adoptions. "Adoptio," says Gaius, "duobus modis fit—aut populi auctoritate aut imperio magistratus." Justinian, wishing to make the process as simple as possible, decrees "licere parenti qui liberos in adoptionem dare desiderat . . . hoc ipsum actis intervenientibus apud competentem judicem manifestare, præsente eo qui adoptatur, et non contradicente, nec non eo qui eum adoptat."[1] Early Roman law was however founded on notions with regard to the family and to status to which there is nothing equivalent in modern States. But one change which to a Roman might seem anomalous was ultimately introduced and might well be taken as an example at the present time when so many have lost their sons in the war. Adoption by women was allowed "ad solatium liberorum amissorum."

France.—By the French Code conditions are laid down under which adoption may take place, and to give legal effect to it inquiry must be made by a Court (1) whether the conditions have been fulfilled, (2) whether the adopter is of good repute. The act of adoption must be published and registered. The person adopted

[1] Cod. VIII. 48, 11.

preserves his rights in his natural family of origin and gains no rights of inheritance as regards the property of the relatives of the adopter, but in the property of the adopter himself has the same rights as a legitimate child. It might be well in any English legislation to follow the French Code as regards these two points, but the conditions laid down by the Code as to the persons who must be parties to the transaction could not be copied if the benefits hoped for from the introduction of a legalised system of adoption are to be secured in England. According to the French Code, the adoptive parent must be fifty years of age, and on the other hand it is provided that " l'adoption ne pourra en aucun case avoir lieu avant la majorité de l'adopté." Rules in a subsequent part of the Code as to the appointment of " tuteurs officieux " may however furnish some useful suggestions for English law.

Germany.—In Germany, adoption is recognised, and " plays a most important part in the social life and condition of the German people." It is regulated by a number of elaborate and carefully drawn provisions which are contained in the Civil Code. A comprehensive statement of these provisions will be found in an article by Mr. Henry Happold of Berlin, which appeared in the *Law Magazine and Review* for August 1914. It is specially important as showing how complicated the question is, how many points have to be provided for, and against how many dangers it is necessary to guard. As in the French Code, confirmation by a competent tribunal is necessary to give legal validity to an arrangement. It is also to be noted that though the adopted child acquires the legal position of a legitimate child of the adopter, the adopter acquires no right of inheritance, and the person adopted acquires no rights as regards the relatives of the adopter. After stating the rules of German law in detail, the writer of the article expresses his opinion that " to introduce legislation into England, based on the laws of foreign countries, would be most dangerous."

Adoption is also provided for in the legislation of British Dominions. In West Australia, for example, a male may be adopted by a man eighteen years his senior, or by a woman thirty years his senior, or a female by a woman eighteen years her senior, or a man thirty years senior.[1] There are obvious objections to persons adopting

[1] See note, *Jour. of Comp. Legis.*, December 1918, *Review of Legislation*, 1916, p. 146.

those of opposite sex, unless there is great disparity in age, and even where the parties are of the same sex, there should be such a difference of age as corresponds roughly to the difference in age which must exist between a natural parent and his or her child. This is a matter which cannot be overlooked in any legislation on the subject.

Proposed Amendment of English Law.—It is true that there is in England no Guardianship Court such as exists in Germany, but there are strong reasons in favour of establishing some tribunals or appointing some officer or giving further jurisdiction to some existing tribunals to protect children. No doubt something has been done by recent legislation, such as the Children Act, 1908, and the action of the Court of Chancery as regards its wards is often most beneficial.

Where it is for the benefit of a child, a father may be deprived of the custody of it or the direction of its education [1] but these questions relating to custody and education have been the subject of long and expensive litigation, which might have been avoided had more definite rules as to the position of those who undertake the care of neglected children been laid down, and effect given to agreements duly sanctioned and registered by some competent authority.[2]

The same tribunal might deal with applications for sanction of agreements for adoption, and also have power, where it is proved that it would be for the benefit of a boy or girl to remain with those who have brought them up, to make an order preventing interference by the parents, and for keeping them in the care of those who have in fact adopted them in infancy and maintained them.

It is obvious that to meet such cases as these, and also others where the parties have very limited means, the necessary legal sanction to adoption must not involve much expense, and cases must be dealt with by some local tribunal or official before whom the parties can appear personally. Possibly the County Courts might be made use of for the purpose. The judge would inquire into the case, and the fact of adoption would be duly registered, and a certificate given to the adoptive parents, stating shortly the effect of the transaction and of the rights and duties conferred and imposed upon them by it.

[1] *Re Newton*, [1896] 1 Ch., p. 748. [2] *Barnardo* v. *McHugh*, [1891], A.C. 388.

Conclusion.—To sum up, the following propositions may be taken as established, and they appear to be confirmed by the experience of other countries :

(1) English law is defective in making no definite provision for adoption. Owing to the war, conditions have arisen which make it more important than ever before to provide a regular method of adoption recognised by law.

(2) If such a method is to be introduced, very great care will be necessary in framing any legislation on the subject. The laws of other countries do not furnish satisfactory guidance.

(3) In addition to the consents of the parties concerned, it is necessary that the sanction of some tribunal or responsible officer appointed by the State should be required to give legal effect to an act of adoption. The act should be registered in order that a proper record may be kept, and the Court or officer should have the duty of seeing that conditions laid down by law are complied with, and the required consents given, and that the adoptive parent is a fit person, at least if the person adopted is a minor, and that the proposal is beneficial for the child.

(4) Rules as to the mutual rights and duties of the parties should be laid down, and also as to succession to property. On this matter the rules of the French Code seem generally satisfactory, but possibly it would be well to allow modifications of the general rules by express agreement of the parties within certain limits. For example the adoptive parent might undertake the maintenance and education of the adopted child and have a personal control without giving the adopted child the right of inheritance. Any such variations by agreement from the general rule ought to be duly recorded.

(5) Provision must be made as to the relative ages of the parties, as to the consents to be obtained, as to security for any property of the adopted child, and as to his or her support and education. The tribunals which have jurisdiction to sanction adoptions ought to have power to deal with cases where the welfare of a child requires that it should be taken out of the custody of parents who neglect it, or whose character makes them so unfit for discharge of parental duties as to cause serious injury to the child.

The Children's Act of 1908 and other statutes have been passed of late years for the protection of children. Possibly it would be well to consolidate these, and at the same time to codify the whole law

as to the guardianship of infants when introducing new law as to adoption. Whether this is done or not, the best way of dealing with adoption would be for the Lord Chancellor and Home Secretary to appoint a small committee, including both lawyers and men and women who have been engaged in social work, to draft a Bill which could be taken up by the Government and then finally dealt with by suitable Committees in Parliament. Even though it may be found desirable to deal with adoption in a separate Bill from the other matters, it will be necessary to consider them together especially in dealing with the question of the tribunals or officers who are to have jurisdiction in cases where the welfare and protection of children are involved. In any event, it is well to recognise that the subject of adoption is a difficult one, giving rise to many questions, which must be settled, and that some preliminary inquiry is necessary before the matter can receive the attention of Parliament.

A "FAIR RENT" EXPERIMENT IN NEW SOUTH WALES.

[*Contributed by* H. V. Evatt, Esq., *of the New South Wales Bar.*]

The land history of Australia in general, and of the State of New South Wales in particular, bears little resemblance to that of Ireland. Yet the same idea of a Fair Rent to be determined irrespective of contract which was advocated by Parnell in 1878, and was adopted by Gladstone in the Irish Land Act of 1881, was canvassed about ten years ago in the various Australian Labour Parties as a possible solution of the problem of housing the people. Partly owing to their natural position, but chiefly to intentional forcing of the lines of trade communication towards them, the cities of Sydney and Melbourne were by 1910 growing to extremely large proportions relative to the States of New South Wales and Victoria, of which they were the respective capitals. This growth was becoming more pronounced in the case of Sydney, which in pre-Federation days could not rival Melbourne in the possession of local industries, and was in fact primarily the clearing-house and importing centre of its State. The development of manufacturing under the uniform Australian Customs Law increased the industrial life of Sydney to a great extent, and created the housing problem of yesterday and to-day. The Labour Party was returned to power in New South Wales in 1910, and in response to repeated demands from the Trade Unions the Government introduced a Fair Rents Bill in 1913, which passed through the Legislative Assembly, but was rejected by the Upper House. In the general elections held in December 1913, one of the issues of the appeal to the people was that rejection, and the Labour Party was returned with an increased majority. The Upper House recognised the constitutional position and a new Fair Rents Bill became law in 1915.

Rack-Renting.—Prior to the passing of the Act the Government

had attempted to assist the Sydney City Council, which had demolished certain slum areas, but lacked the necessary authority to construct new buildings in place of the old. The assistance took the form of certain garden-suburb experiments, designed to relieve the congestion. This congestion was becoming serious, and was keenly felt early in 1914. Along with it came a good deal of "rack-renting," a phrase used in Australia with a particular mediæval connotation of the term "rack." In many cases it was proved that special bonuses were being given to agents by hungry home-seekers in order to secure dwellings, and private builders, afraid both of further Government housing experiments and of threatened increases in the cost of materials and labour, were not eager to relieve the situation.

At this period came the war, and by the middle of 1915 rents had eased somewhat when the effect of the absence of Australian troops began to be felt. It was at this juncture that the Fair Rents Bill was reintroduced.

The chief object of the Government in introducing the Bill was to put an end to existing "rack-renting." As mentioned above, the rents towards the end of 1915 were lower than those at the beginning of that year. This was admitted by the Government, which pointed out that the second object of the Bill was to prevent the possibility of "rent profiteering" during the war by enabling a tenant to have a fair rent of his dwelling determined by a summary tribunal "of equity and good conscience," providing a "rough-and-ready method of arbitration" between the conflicting parties. The Government admitted further that the Act would not solve the housing problem or prevent its recurrence when the reaction from war conditions should set in. But they argued that at least the Act would deter unscrupulous landlords from acting unfairly, and that therefore it would provide a valuable protection to the tenant.

Opposition to the Bill of 1915.—The Bill was strongly opposed on the grounds that it interfered with the "economic law of supply and demand," that it attempted the impossible in endeavouring to fix a rental, and that it would prevent building operations from being started, owing to the subjection of the landlord to the control of the Court. One critic, Sir Joseph Carruthers, M.L.C., an ex-Premier of New South Wales, even suggested that after its sure and

certain failure the Act should be burned by the common hangman, and declared that a person building in future deserved to be sent to Callan Park, a well-known Sydney lunatic asylum. The arguments against the Bill did not prevail, although certain important amendments were suggested in the Upper House, and accepted by the Government. Australian public opinion is seldom disturbed by the fear that a definite practical proposal may offend against "fundamental economic laws," if it is seen that the scheme so criticised seems to be fair in its projected operation and worthy of a trial. The Labour Party in power at the time was still "socialistic" in the way suggested by Metin in his phrase "Socialisme sans doctrines." Their theoretical objective, providing for the socialisation of all the means of production, distribution, and exchange, was still kept in the background, and prominence was given to the immediate fighting platform consisting of definite practical schemes, *quorum magna pars* the Fair Rents Act, 1915. By that Act, reports the Inter-State Commission of Australia,[1] "the right of the landowner, recognised as a cardinal one for many centuries, to get what rental he can for his property, is displaced by a Statute of 25 sections." Let us glance for a moment at the provisions of the Act.

The Act of 1915.—The Act is intituled *inter alia* "To provide for the determination of fair rents for certain dwelling-houses, and to enforce such determination." It applies to all premises leased wholly or partially for residence by a lessee, and includes any part of such premises separately leased. It applies therefore to flats, although very few applications have been made in those cases, and also to shops attached to a dwelling. Leases exceeding three years, or leases at a rent of more than three pounds a week, are excluded from the operations of the Act.

The Act binds the Crown, and its aid has been sought by tenants holding from the Government authority in the Rocks area of Sydney, where after resumption and demolition of a large slum area new dwellings were erected.

Dwellings ordinarily leased for summer residences are not subject to the Act, which has not yet been extended outside the metropolis of Sydney. The various Sydney seaside residences

[1] *Report of the Inter-State Commission of Australia dealing with Prices*, sub-nom. Rent, July 1919.

which bring an increased rental in the summer months are also occupied as a rule throughout the winter. No case, however, has yet arisen in which an exemption from the Act has been granted on the ground mentioned.

The Act is to apply as proclaimed throughout New South Wales, but as already pointed out, has been restricted in its operation to Sydney.

Fair Rents Courts are established, each to consist of a Stipendiary or Police Magistrate, as recommended and appointed. So far only one Court has been constituted for the Sydney area, and it has been able to cope with all the applications under the Act.

A Registrar is in charge of the business side of the Court, and he has carried out the whole of the administrative work without other assistance than that of a part-time assistant.

Applications to the Court may be made in the form prescribed, either by a tenant who has paid his rent to date, or by a landlord. Particulars must be given in the application of any existing mortgage, and the mortgagee is entitled to notice of the application, and to be a party to the proceeding.

The Court is empowered to receive as evidence statutory declarations as prescribed, and oral evidence either in the ordinary way or for the purpose of cross-examination on the contents of a declaration. The procedure as to examination of witnesses, addresses, etc., is to be the same as that of the Supreme Court of New South Wales in its common-law jurisdiction, but in practice little oral evidence is adduced, and the Magistrate is guided by the four main statutory declarations—those of the landlord, the tenant, and the two experts mentioned below.

The Calculation of the Fair Rent.—The Act provides a definite scheme for the determination of the fair rent of a dwelling.

(*a*) The unimproved value of the land is first ascertained. This value is defined to be the capital sum which the fee simple of the land might be expected to realise if offered for sale on such reasonable terms and conditions as a *bona fide* seller would require, assuming that the improvements, if any, thereon or appertaining thereto had not been made. The Court in the ascertainment of this value is assisted by an expert Government land valuer, who makes a declaration, and if required attends for cross-examination.

(*b*) The Court next estimates the cost of erecting a similar

dwelling-house on the land at the time of the application, and deducts such fair and reasonable sum as may be allowed for depreciation of the actual dwelling the fair rental of which is being determined. In this assessment the Court is assisted by its second expert, a Government architect, who makes a declaration, and gives an estimate of depreciation allowing for the age, condition, construction, and lettable value of the dwelling.

(*c*) The capital value of the dwelling-house is then obtained by adding the value of the land obtained in (*a*) to that of the dwelling obtained in (*b*).

The next calculation is that of interest on the capital value to be allowed to the landlord. The Act provides that this interest is to be not less than the current rate charged upon overdrafts by the Commonwealth Bank of Australia, and not more than 2½ per cent. above such rate. The Court's interpretation of this provision is that the reference to the Commonwealth Bank shows the intention of the Legislature to adopt that rate as the standard, and that the 2½ per cent. margin is to be considered only in extraordinary circumstances. The current bank rate laid down as a basis is 6½ per cent., and that is taken as the rate to be struck, plus ½ per cent. for collection of the rent. It has been contended that this interpretation is too narrow a one, and that the Court is entitled to allow the whole of or part of the marginal rate on any ground it may choose, *e.g.*, the state of the market in other investments. The Court's interpretation is made final by another provision of the Act, and so the superior Courts have been prevented from criticising such interpretation. In support of the Court's view as to the intention of the Legislature, it is said that the Act is simply a determination between landlord and tenant, and that all it has to deal with is the single issue between the parties at the time of the hearing. If that is so, outside circumstances, such as the encouragement of building, and the state of the market, are not relevant, and the Commonwealth Bank's rate is fairly indicative of what the Legislature considered to be a fair thing as between the rival parties.

To the 7 per cent. of the capital value, as ascertained above, the following items are added by the Court in order to fix the fair annual rental:

(*a*) The annual rates as levied by Local Government, Water, and Sewerage authorities.

(*b*) The annual taxes imposed by State and Commonwealth on the land or the income derived therefrom.

(*c*) The amount estimated to be required annually for repairs, including painting, maintenance, and renewal.

(*d*) The annual insurance on the buildings.

(*e*) The amount estimated as annual depreciation in the value of the buildings where such depreciation is shown to have diminished their letting value. This allowance enables the landlord to establish something analogous to a sinking fund based on the lettable life of the dwelling.

(*f*) The amount (if any) the Court may allow for the estimated time per year when the dwelling-house is untenanted. To ascertain this item the Court takes a period of two years immediately preceding the date of the application as a guide.

The Act goes on to make the very important provision, which seriously qualifies the above method of calculating the annual fair rent, that, excepting where circumstances which render an increase equitable are proved to the satisfaction of the Court, the fair rent shall not exceed the rent at which the dwelling was let on the first day of January 1915.

The date mentioned is precisely one year before the commencement of the Act, so that where the Court is dealing with applications in the present month (July 1919), it generally has to refer to the rent existing four and one-half years ago. Considerable objection was raised to this in Parliament, but it was pointed out, and indeed it was a fact, that rents in Sydney were at an extraordinarily high level towards the end of 1914 and the beginning of the following year. War had broken out in August of 1914, but the departure of Australian soldiers had little appreciable effect in lowering rentals, until some time near the middle of 1915. On January 1, 1915, rents were higher than in August of 1914 or in August 1915. Consequently although the provision set out has had the effect of stabilising rents, stability has been maintained at a high and not at a low level. The same policy had been adopted in a British Statute—the Increases of Rent and Mortgage Interest Act, 1915—which was passed for the period of the war and six months thereafter. In his interpretation of the provision, the Magistrate of the Fair Rents Court has apparently dealt with "the circumstances which render an increase equitable" under three main classes, viz :

(*a*) Cases in which the rental as at January 1, 1915, was based on charitable or family as distinct from business reasons.

(*b*) Cases in which improvements in the dwelling effected since that date have resulted in a substantial increase of comfort to the tenant. It has been held that the addition of a bathroom to the dwelling is such a substantial increase.

(*c*) Cases in which the burden on the landlord has been considerably increased since January 1, 1915, owing to the heavier incidence of taxation or to other reasons.

The following case dealt with by the Court illustrates how the provision is applied:

	£	s.	d.
The total capital value of the dwelling was estimated at .	604	0	0
6½ per cent. on this value had to be calculated in accordance with the method already explained, and came to . .	39	5	2
Annual rates and taxes	6	2	11
Estimated annual repairs	8	0	0
Insurance	0	14	11
Depreciation affecting the letting value, estimated at 1s. a week	2	12	0
Total as arrived at under the Act	56	15	0

The Court estimated this total (£56 15s.) as being equivalent to a rental of 22s. per week. It then had to apply the provision at present under consideration, viz. the rental as at January 1, 1915. This rental was 17s. 6d. per week, and the Magistrate had then to consider whether there were circumstances rendering an increase equitable. It was proved that in 1915 the annual rates and taxes and the cost of repairs came to £7 12s. 11d., and it is seen from the above figures that the present burden to the landlord in rates, taxes, and repairs is £14 2s. 11d. The Court therefore estimated the additional burden to the landlord as the difference between these two amounts, which came to £6 10s. per annum, which is equivalent to 2s. 6d. per week. It was therefore held that the present fair rental should be the 17s. 6d. rental of January 1, 1915, plus the 2s. 6d. per week thus calculated, and the rental was accordingly fixed at 20s. per week.

The provision moreover has apparently tended to induce persons desirous of investing in property to build new dwellings rather than to deal in houses constructed before 1915. The Court has very seldom refused to increase the rent of dwellings constructed since that year and to which, of course, the provision cannot be applied.

In the case of a dwelling occupied by two or more lessees, the Court determines the fair rent of the whole dwelling, and then apportions the fair rental for the particular tenant before it. This provision is used in the case of flats, and also in the cases where two families share a home in a crowded area.

A tenant not in default who is applying to have his rental determined is protected from being given notice and from having the rent increased while the application is pending, and for three months thereafter, unless the landlord can show reasonable cause for such action.

In the case of a furnished dwelling-house where the furniture is also leased, the Court determines the fair rent of the dwelling, and then adds an estimated furniture rental.

The determination of the fair rent of the dwelling has force for a period between six months and three years as the Court directs, and, if no such direction is made, for three years. In practice the Court always fixes the period at twelve months.

While the determination is in force, the rent must remain as fixed notwithstanding any change of ownership or tenancy, unless the landlord satisfies the Court that since the award substantial alterations or additions have been made to the dwelling, or else that his outgoings in respect of the dwelling have been increased.

Terms or covenants in existing or subsequent leases of the dwelling are subject to the decision of the Court as to the fair rent, and rent paid in excess may be recovered. Penalties are provided to meet the cases of landlords ignoring the Court's determination by asking for or receiving additional rent, and also of persons threatening tenants against applying to the Court or acting detrimentally after application is made.

No costs are allowed in any proceeding under the Act. It was at first intended to prevent the parties from obtaining any legal assistance at all, but that provision in the Bill was not adopted. In practice the Court acts on the four declarations already mentioned, and the procedure is more ministerial than judicial. In the early cases before the Court counsel were briefed in order to secure interpretations favourable to the landlord, but now legal assistance is seldom invoked by the parties. As there is no appeal from the Court's determination, the fixing of the rent has been arrived at in the way intended by the authors of the Act—a summary method of arbitration between landlord and tenant.

Covenants or agreements limiting the right of a person to take the benefit of the Act are made null and void.

Proceedings of the Court.—On an average the Court sits once a week, and deals with about seven applications in about two hours. From the commencement of the Act in 1916 to June 30, 1919, there have been 1,301 applications to the Court. Apart from pending applications the figures as to the operation of the Act are as follows :

Number of cases—Rent reduced	487
" " " —Rent increased	182
" " " —No jurisdiction	60
" " " —Withdrawn	241
" " " —Rent not altered	229
Total, apart from pending applications	1,199

In the majority of cases in which the Court had no jurisdiction the objection was on the ground that the tenant was in arrears. The smallest increase in rent granted was 6*d.* per week, the largest 10*s.*, and the average increase 1*s.* 8*d.* The smallest reduction was 6*d.* per week, the largest 6*s.*, and the average deduction 1*s.* 11*d.* The figures given show 182 cases in which the rent was increased, but it must be remembered that the application usually comes before the Court after the landlord has notified his intention to increase the rent, and that probably the usual increase so notified is for more than 1*s.* 8*d.* per week, the average increase granted by the Court. The figures for the first six months of the present year taken alone show that there were 104 cases of increase as against 58 cases where the rent was reduced ; this illustrates what is undoubtedly a fact—that within the provisions of the Act the landlord is treated fairly by the Court.

The Effect of the Operation of the Act.—In considering the effect of the Fair Rents Act after a working of something over three years, it is instructive to point out the present position of housing in Sydney. The Inter-State Commission dealing with the question unanimously report[1] the existence of a "mischief which overwhelming testimony shows to be acute, arising from the actual deficiency in the number of houses necessary for the community, and which has caused a notable increase in overcrowding, coupled with the existence and enforced occupation of a mass of dwellings in our cities which fall short of the meanest standards of health

[1] See reference, *ante.*, p. 10.

and comfort, and which constitute a serious social menace." In Sydney the resumptions for the purpose of street widening, apart altogether from the Rocks resumptions, dispossessed the inhabitants of 1,760 dwellings, and in addition factories and business houses have had a similar effect. At the end of 1917 it was estimated that there was a shortage of about 9,000 houses, and the shortage at the time of writing (July 1919) cannot be less than 13,000. To what extent has the Fair Rents Act been responsible for this serious and dangerous position ?

An outstanding feature of the evidence given before the Inter-State Commission in Sydney was the dissatisfaction expressed by agents and investors with the Act and the Court. It was claimed by them that the 6½ or 7 per cent. of the capital value on which the Court commenced its determination was entirely insufficient, and that at least 8 per cent. should be taken as a nett rental rate. Although, as we have already seen, the official valuer to the Court estimated that the landlord was getting a gross return of 10 per cent. under the Act, this figure was keenly disputed. In view of the weight and body of this evidence there can be no doubt but that " the Act has increased the disinclination to invest particularly on the part of the ' speculative builder ' who before the war provided a large proportion of the new dwelling-houses at rentals within the reach of the industrial classes." This conclusion of the Inter-State Commission seems quite justified, and indeed it is clear that the object of the Act was to deal only with the rival claims of landlord and tenant, and that the Court seeks only a present remedy to the dispute between those parties, and has little regard for the future investor in household property.

But, as was also pointed out by the Commission, the same disinclination to invest exists both in Brisbane and in Melbourne, where there are no Fair Rents Acts, and so " the effect of the new law cannot, therefore, be regarded as more than supplementary to the general causes tending to check building for investment." This conclusion is reinforced by three considerations. In the first place, it must not be forgotten that the period of the Court's working has been an abnormal one in the highest degree. In most belligerent countries there was a practical end to building activity during the currency of the war, and Australia in general and New South Wales in particular have provided no exception to this rule. In the

second place, the acute shortage of houses has been felt even more keenly in Melbourne than in Sydney, and Melbourne in its own relative situation to Victoria and in its own industrial life bears a very close analogy to Sydney. In Melbourne building for investment has been checked to at least as great an extent as in Sydney. In the third place, the general causes of the decline in building have operated throughout Australia more or less uniformly. Those causes have been the difficulty of obtaining money for the purpose owing to the general financial position, the greatly increased costs of materials and labour, and possibly a certain amount of discouragement caused by the working of certain sections of the Federal Land and Income taxes which apply of course throughout the Commonwealth.

Sydney has been subject to all these general influences, and no doubt the Fair Rents Act has added a little to their cumulative effect. But the Act is certainly not the *causa causans* of the present housing crisis, which extends throughout all the eastern and southern cities of Australia.

On the other hand, the Act has worked both smoothly and inexpensively. The number of cases given above in which the rent was reduced does not fully illustrate the very considerable part played by the Fair Rents Court in keeping down rents during the difficult war period. Further, the provision fixing the general standard as at January 1915 has brought about the stability which was desired, and generally, the Inter-State Commission is fully justified in its conclusion that "the Act has been a formidable bulwark against raising rents where no additional service is given by way of accommodation or equipment, and this deterrent operation of the Act represents its most valuable achievement."

It is not possible, therefore, to pronounce final judgment as to the effect of the New South Wales experiment. The expected fall in the price of building requisites, which has not yet eventuated, will make the way clear to a more definite conclusion. But if an interim opinion must be given, it does seem that the Act, although acting as a restraint both to the "speculative builder" and to the cautious and timid investor, and thereby adding its quota to the causes of the housing shortage, has certainly kept rents at a reasonable rate during an exceptionally difficult period, and acted as a valuable deterrent to the building "profiteer."

THE RENASCENCE OF JEWISH LAW.

[*Contributed by* BERTRAM B. BENAS, ESQ., B.A., LL.B.]

THE Declaration of the British Government in favour of the establishment in Palestine of a National Home for the Jewish people, followed by, among others, the French, Italian, and Japanese Declarations in support thereof and the pronouncement of President Wilson's sympathy with the project, invests the Holy Land with an interest to which for long it has been a stranger. Zionism—the Jewish National Movement, which endeavours to rationalise the position of the Jewish people *qua* people *vis-à-vis* the other peoples of the world by securing the recognition of Israel's Ancient Homeland as the centre of Jewish nationhood—should, in its realisation according to the Allied proposals, do much to restore Jewry as an entity to its entitled niche in the world's household.

It is, perhaps, not generally recognised that there is a Jewish *Corpus Juris* beyond that expressed in the Pentateuch. Jewry has led a sequestered life—largely enforced—for so many centuries that its apparatus of corporate existence, maintained so far as exterritorialisation allowed, has passed unnoticed. Its scholarship has been mostly inaccessible through its Hebrew or Chaldaic key, and modern emancipation, by the liberation of the Jewish individual and the consequential dissolution of Jewish corporate individuality, has tended to obscure its existence more fully. The call to renationalisation brings to light the machinery of Jewish life, and a rich and humane civilisation is rediscovered.

The Source of the Law.—Legislation, in the Jewish system, is declaratory from the Supreme Source. This is the only Jewish legislation—legislation regarded in the light of supreme statutory written laws. The Oral Law in the meantime co-exists, and is expounded through a system of hermeneutics by the Jewish jurists, and becomes a code. Part of the system is necessary elucidation, just as the interpretation of a modern statute is called for

almost immediately after its enactment. But much of it is more than interpretation; it is adaptation to the requirements of the progress of civilisation—requirements which may at first have been brought about by the internationalisation of the land of Israel through commercial development, and later by the internationalisation of the Jewish people through the detachment of their political sovereignty over the land of Israel. In both, contact with a wider world appears to have been the cause.

Its Interpretation.—The Jewish Law has developed to a considerable extent by means of the decisions of its courts of law, and by the "Responsa Prudentium," "the answers of the learned in the Law" (see Maine, *Ancient Law*, chap. xi., as to similar phenomena in the Civil Law).[1]

The circumstances of history have tended indirectly to preserve the authority of Jewish Law by the comparative segregations of the Jewish people in the various countries of the Diaspora. A segregated community, congregated within itself, develops a public opinion whose sanction has a considerable coercive force.

Jewish tradition ascribes the Oral Law to Sinai, whence it "descended through an unbroken line of authorities to the latest times. This theory is substantially the same as that by which the

[1] The May and June 1917 (vol. lxv.) numbers of the University of Pennsylvania *Law Review* contain an article by Dr. Nathan Isaacs, of the Cincinnati Law School, entitled, "The Law and the Law of Change—a Tentative Study in Comparative Jurisprudence." It is prefaced by an introduction from the pen of Mr. Adolph S. Oko, librarian of the Hebrew Union College, who, adding a footnote to the remark that Dr. Isaacs is the first to travel in the field of Jewish Legal History along the road pointed out by Maine, observes: "While seeing this article through the Press we have come upon the footprints of a predecessor, at least along the beginning of the road. *The Jewish Review* (London, 1914, vol. iv. No. 23) contains an article on 'Legal Devices,' by Bertram B. Benas, in which the second chapter of *Ancient Law* is quoted along with Blackstone and Dicey, mainly in an effort to justify the legal evasions of the law as 'fictions.' In commenting on the characteristics in legal history pointed out by Maine, the author remarks that 'many of them are capable of almost complete illustrations by Jewish legal history.' Mr. Benas, however, seeks illustrations for only two: the resort to fictions and growth by 'Responsa Prudentium.' Without Dr. Isaacs' theory of recurrent cycles it would be difficult to apply Maine's principal observation, the sequence of the instrumentalities, to Jewish Law. And Mr. Benas, indeed, feels called upon to explain why legislation seems to appear in the wrong place: the Jews, he says, 'have no legislation in Maine's sense'!" The article to which reference is made deals with the general juristic phenomena of legal devices, and follows the introduction to and paraphrase (by the Rev. I. Raffalovich) of chapters based on the "Responsa" of Rabbi S. J. Rabinowitz, the learned Liverpool Rabbi, affording a close study of their Rabbinic aspects (vol. iv. No. 22).

origin of the English Common Law is explained." The Written Law, or Mosaic Legislation, is termed in Hebrew the "Torah She'bktab," or "The Law in Writing," and the Oral Law, the "Torah Shebe-'al-peh," or "the Law by Mouth," an early instance of lucid and accurate jurisprudential nomenclature, for the terms were used by the Rabbis Hillel and Shammai (who lived in the reign of Herod) to describe the "two Laws," written and oral. The Mishnah was the first Jewish post-Biblical code of laws, and its compilation was completed in the year 189 of the present era. The Gemara includes the discussions, interpretations, and expositions of the Mishnah by a school of Rabbis known as the "Amoraim," or Interpreters—the Rabbis of the Mishnah being known as "Tannaim," or Teachers. The Gemara, which exists in two forms, the Babylonian and the Palestinian, took, in compilation, from the third to the sixth centuries, C.E.

The Talmud.—The Mishnah, together with the Gemara, is generically designated the Talmud [1]; but the Talmud is often used in the more limited sense of the Gemara, just as the word "Torah," strictly the Pentateuch, is sometimes used compendiously for the whole Jewish *Corpus Juris*.

The Talmud is capable of many subjective classifications, because, like most ancient and much of the Oriental writings in general, it does not possess the objective systematisation of Occidental arrangement. Its most useful analysis is into that of Halacha (Law) and Haggadah (Exegesis). "The Talmud," observes Dr. Daiches,[2] "is not only a commentary on the Mishnah, but has also new life elements. It is not a code of laws, but a life-book." It is not that the legal elements are merely incidental, still less accidental—they are coincidental in narrative with the mass of tradition which found its way into the *Hansard* of Jewish authoritative discussion. Popular handbooks to the Talmud more naturally concentrate upon the legendary elements, for, while the legal elements represent the mind of Jewry's body politic, the legendary elements express its heart and, as the vital current which animates

[1] The words Mishnah, Gemara, and Talmud all connote in varying degrees the idea of Learning and Teaching. The reader should regard the several versions of the technical terms as general indications of their purport rather than definite translations.

[2] "Jewish Codes and Codifiers," in *Aspects of the Hebrew Genius*, ed. Simon, p. 89.

its spiritual system, are instant in appeal to those of all creeds who follow or appreciate the Theistic traditions of the Hebrew Scriptures. It is obvious that no popular handbook could make its reader learned in Jewish Law; but, on the other hand, the concentration of existent monographs dealing with the Talmud upon the legendary elements have tended to obscure to other than Jewish scholars the very existence of a living Jewish *Corpus Juris*, and have allowed the notion of a Jewish Law, if such notion were present, to be limited either to the Pentateuch or at most to a system of Ecclesiastical Law.

The "Torah."—The "Torah," in the stricter sense of "the Pentateuch" was the supreme statute-book of Jewish legislation. If the Pentateuch, like its Talmudical commentaries, contained both the "religious" laws as well as the civil and criminal laws of the Israelitish nation, it must be noted, first, that such a circumstance was appropriate to a Theocracy; secondly, that the dichotomy of life into sacred and secular compartments is not an Eastern habit of mind; and, thirdly, that classification into precise categories is not a characteristic of either the early legal or early philosophic systems of antiquity. The determination of Jewish Statehood rendered the coercive jurisdiction of the Jewish criminal law a matter of but theoretical and historical interest, while on the other hand it appears to have intensified the development of civil law by throwing the Jewish jurists back upon their own resources to discover in and through the law a method of preserving the Jewish entity in Diaspora, a process bearing some analogy to the pursuit of legal learning by the eminent English conveyancers, whose ingenuities were displayed to the full in the development of the principles of uses and trusts. The development of this civil law is to be traced through the Talmud, the commentaries, the later "Codes," compendiums, and "Responsa" down to the present day through the enormous output of Jewish juridical literature. To the non-Jewish reader (and to the uninformed Jewish reader) the mere narration of the names of these works would be but a catalogue serving no useful purpose. But the fact remains that probably no legal system in the world is so rich in commentary and codes as the Jewish, and no system can disclose a lengthier traditional line of men devoted to the study of the Law. The statement of the Jewish Law very largely reflects the contemporary

conditions of the Jewish people. The Pentateuchal civil law points to the needs of a people mainly agricultural, with its personal property, chiefly that associated with agricultural realty. Its conveyancing was evidentiary in nature (see Gen. xxiii. 3–16), but Jethro's advice (Exod. xviii. 15–26), the case of the daughters of Zelophehad (Num. xxvii. 1), and the breach of the Sabbath Day Observance (Num. xv. 32–6), all show, from the Pentateuch itself, that not only there existed a "common law" over and above the statute law, but judicial sources, supreme and subordinate, capable of declaring the common law and interpreting the statute law. Sir Frederick Pollock, in his "Introduction and Notes" to Sir Henry Maine's *Ancient Law*, p. 5, observes: "We may safely say that the case of Zelophehad's daughters is the earliest recorded case which is still of authority"—a tribute to the antiquity and continuity of the Jewish Law, and its distinguished and distinctive place in Jurisprudence. The case of the daughters of Zelophehad came to the fore again as an authority for consideration by those other than Jewish jurists, when the Jews of Aden, which is technically regarded as part of British India, asked that they might be exempted from the Indian Succession Act (x. of 1895) and restored to their old law "the ruling in Zelophehad's case." The Jews of Yemen had lived under this law for some thousands of years, and, with characteristic governmental genius for according the appropriate legal justice to all nationalities, the request was readily granted and the old Jewish law was upheld by the British Judiciary.[1] By the time of the prophet Jeremiah the conveyance had already taken a documentary form (Jer. xxxii. 9–10), and after the Babylonian exile the intercourse with other nations and the circumstances of the return tended to heighten the value of personal property and depreciate the position which landed interests held in the economy of Jewish life. The rôle which Palestine was filling as a commercial corridor between the continents further developed the contractual element in business life, and reflected itself in the expansion of Jewish Law to meet the changing conditions of Jewish life. The methods by which the Jewish jurists evolved their common law and applied their statute law in pre-Talmudic times prepared the way for the great task, for which the Talmud itself laid the founda-

[1] See Sir Courtney Ilbert's article "Early Jewish Law and Custom," *Journ. Comp. Leg.*, Vol. xvi, at p. 143, and his *Government of England*, p. 397.

tions, of fitting Jewry to live a civilisation of its own, so far as the Diaspora permitted, when Jewish Statehood was overcome by the physical forces of the Roman Empire. Then the machinery was perfected which has preserved Jewish Law, and kept it alive to this day. The "Beth Hamedrash" and the "Beth Din" were complementary to each other. The "Beth Hamedrash," or House of Study, was a centre instinct with the ideal of a University, where knowledge is not only sought, but advanced; where there is not merely search, but research; where there is both learning and Learning, whence comes both teaching and Teaching. The "Beth Din," or House of Judgment, applied the Law to the concrete facts of life.[1] The "Responsa Prudentium" of Jewry ("Shéèloth-u-Teshuboth"), questions and answers containing the recorded rulings and decisions of Rabbis to formal questions put to them on points of law and their application to given circumstances, have a validity greater than that of "Counsel's Opinion" in the Common Law, and are more akin to the customary sanction attaching to the practice of eminent conveyancers, while, of course, their range was far less restricted. On the other hand, they were the natural medium for the elicitation of the Law in hypothetical cases, and thus supplemented the Codes by their anticipatory capacity of dealing with eventualities not fully contemplated by existent enactment or decision. The literature of the "Responsa" stretches over a period of some 1,700 years, and over a hundred thousand specimens are said to be extant. Probably their continuance has been the least imperilled by the circumstances which at the present day have tended to weaken the "Beth Hamedrash" and the "Beth Din," for both the latter depend upon a local community sufficiently zealous to establish them and sufficiently traditional to maintain them, whereas a learned Rabbi, wherever centred, becomes in himself the source whence "Responsa" radiate to a circle of the widest possible circumference—and contemporary responsal litera-

[1] The "Beth Din" (House of Judgment)—the Hebrew title for the Rabbinical Court—is an historic Jewish institution of the first importance. The "Beth Din" in London (the "Chief Rabbi's Court") has received judicial notice in the English Courts. It was the practice of one of the judges, in the County Court area of London containing the largest number of Jewish inhabitants, to treat the rulings of the "Chief Rabbi's Court" as authoritative upon questions of Jewish Law (see H. A. Smith, *The Law of Associations*, p. 47). Manchester and Leeds, cities with relatively large Jewish communities, each possess a "Beth Din," which sits periodically. In Liverpool a Court is held from time to time, as circumstances require.

ture confirms the view that it will remain a perennial stream of refreshment for Jewish legal learning and practice.

It is not within the scope of this article to give either, on the one hand, a review of the Talmudic treatment of juristic conceptions, or, on the other hand, a detailed account of the working of any single specific branch of the Law. Both demand the attention of specialised treatment, more particularly the former. What has been attempted is an endeavour to indicate the existence of an extra-Biblical Jewish *Corpus Juris*, its continuity in practice to the present day, and the possibilities of renewed vitality by its application to the renascent national life of the Jewish National Home to be re-established in Palestine.

School of Jewish Law.—Probably no greater task—certainly none more fraught with historical interest and fruitful possibilities—lies before the Hebrew University of Jerusalem about to be established than the institution of a School of Jewish Law. There both historical research and practical application must inevitably go hand in hand—to the good of the ideal of jurisprudential study, and to the good of the future progress of the country and the people. Developed Jewish Law will have a chance of freedom that it has not as yet enjoyed. For long the special study of pietists, it has never had the full advantage of sustained consideration from those versed in the great legal systems of Occidental civilisation or of the Farther East. In the nineteenth century it is true that it became the subject of much " scientific " exploration, but rather at the hands of those who were more at pains to trace its legal developments as milestones in the history of Jewish culture than from the standpoint of general jurisprudence. In the meantime the civic emancipation of Jewry had reduced the area and the degree of voluntary submission to the authority of the existent Jewish tribunals, with the result that, both in its theoretical and practical consideration, Jewish Law, as such, appeared to approach the confines of those matters which have lost their touch with reality, and the march of time has produced a receding effect on the prospect towards the " Shulchan Aruch," the " Table Prepared "—the last authoritative codification of Jewish Law—compiled by Rabbi Joseph Caro, a Spanish Jewish scholar of the sixteenth century who lived most of his life in Palestine.

It may not be too fanciful to hope that, as the last standard Jewish Code emanated from Palestine, to Palestine we

must look for the Jewish Code of the future. There Jewry, surrounded by a natural civilisation of its own and inspired by the bracing activities of its re-establishment, will regain that touch with life which alone can give to legal structures the human element to clothe their forms with vitality. But this process needs guidance, and the very co-existence in Palestine of extreme pietists on the one hand, and ultra-rationalists on the other, will give to the University School of Law an opportunity—probably welcomed by both elements—to hold the just balance. It would be an advantage for the School of Law—having an eye not merely to the needs of a Jewish Palestine, but to the relations of a Jewish Palestine to the rest of the world—to have a dual set of teachers and researchers—one set of learned Jewish jurists who have been trained under the Common Law, and another set similarly qualified in Jewish Law, but likewise trained under the Civil Law. As a liaison between the two departments, there could well be an Arabic jurist versed in the Mohammedan Law, who would be likewise cognisant of the Jewish Law, the Common Law, and the Civil Law, and thus truly link East and West. Both departments might be entrusted with the compilation of an interpreter to the Common Lawyers and to the Civilians of the legal principles of the Jewish Law in terms of their respective legal conceptions. This might be a foundation upon which the superstructure of further efforts could be raised. For knowledge of the exact standpoint of Jewish Law on principle will enable modern jurists to appreciate the bases upon which the edifice of new developments to meet modern international requirements must be built. The effort should provide an interim working Code, capable of amendment as further research develops. In the meantime Jewish legal history could be the subject of parallel endeavour on a scale never before attempted. That the fruits of such research would be a harvest from which gleaners from many distant fields could reap, there is no gainsaying. Britain, with its far-flung settlements administering the laws of many peoples, if entrusted as a mandatory by the League of Nations for a Jewish Commonwealth in Palestine, will thus take unto itself the Sacred Law of the Israelitish nation—for Law itself is sacred to the Children of Israel.

STATE CONTROL OF INDUSTRIAL ACCIDENT INSURANCE.

[*Contributed by* C. M. KNOWLES, ESQ., LL.B.]

THE British Government, through the Home Secretary, has appointed a Committee to inquire into the working of the present system of Workmen's Compensation in the United Kingdom; to determine what alterations of the law on that subject are necessary in order to remedy the defects which have been disclosed by experience; and to consider whether it is desirable to establish a system of accident assurance under the control or supervision of the State. The Committee speedily saw that their conclusions in regard to the last head of the terms of reference must govern their recommendations in regard to the other points of the inquiry. The present article is founded on evidence which was laid before the committee and represents an attempt to assist this preliminary investigation by the comparative method.

Guarantee of Compensation.—No system of Workmen's Compensation can be regarded as complete which does not include provisions ensuring that the compensation which the law declares to be due shall be actually paid.

The English Workmen's Compensation Act of 1906 imposes upon the employer the liability to pay compensation, but it provides no guarantee, on the one hand that the compensation shall in fact be forthcoming or, on the other, that in paying a compensation claim the employer will not be ruined. The Act recognises, but does not require insurance in respect of liability thereunder. The relevant sections are:

(*a*) S. 5, which enables the workman, as against the insurance company, to step into the shoes of a bankrupt employer who has insured in respect of liability under the Act. (*b*) S. 8 (7), which provides for compulsory insurance in a tentative way, and is con-

fined to industrial diseases brought within the scope of the Act. The clause was asked for by the pottery trade, where mutual insurance schemes had been in operation and worked well. It was granted as an experiment which might furnish useful experience against the time when compulsory insurance might be suggested for general application.

The absence of any provision for guaranteeing compensation in the British Act is peculiarly striking in view of the fact that it includes within its scope small employers generally, whereas many foreign statutes exclude agriculture, domestic service, and employers with less than a certain number of employees.

The statutes of other countries exhibit two methods of securing the payment of compensation: (*a*) State guarantee. (*b*) Compulsory Insurance.

State Guarantee.—This system is found in France and Belgium. Italy also has a State guarantee fund.

Under the French method the State collects a guarantee fund by means of a small tax upon all employers included in the law. If, through insolvency, or for any other reason, the employer or insurance company fails to pay the compensation due, the State fund satisfies the claim.

The Belgian system differs from that of France in that the State guarantee fund is maintained by a tax levied only on uninsured employers.

In Italy the fund is fed by fines and unclaimed compensation.

These are early statutes, and the system of State guarantee appears to have no modern imitators in other countries.

Compulsory Insurance.—Insurance is the method of guarantee which is invariably foremost for consideration in recent times, and when it is compulsory it is a form of statutory guarantee. The tendency throughout the civilised world seems to be definitely towards compulsory insurance, as appears by classifying countries having Workmen's Compensation laws into those where insurance is voluntary and those where it is compulsory, and appending the dates of the respective Acts now in force. Voluntary Insurance has been adopted in the British Empire as follows: Great Britain, 1906; Newfoundland, 1908; Quebec, 1910; New South Wales, 1910; South Australia, 1911; Tasmania, 1911; New Zealand, 1911; West Australia, 1912; South Africa, 1914.

In the United States the dates of the Voluntary Insurance Acts are: Kansas, 1911; Minnesota, 1913; Arizona, 1913; Louisiana, 1914; Alaska, 1915.

In other foreign countries legislation was passed—in France, 1898; Spain, 1900; Belgium, 1903; Mexico, 1906; Japan, 1911; Salvador, 1911; Peru, 1911; Portugal, 1913; Argentina, 1915; Colombia, 1915; Sweden, 1916; and Denmark, 1916 (compulsory for seamen).

The later legislation dealing with Compulsory Insurance was enacted in the British Empire: In Ontario, 1914; Nova Scotia, 1915; Victoria, 1915; Queensland, 1916; Manitoba, 1916; British Columbia, 1916; Alberta, 1918; New Brunswick, 1918.

State legislation in the United States prescribing compulsory insurance was passed as follows: Ohio, 1911; Washington, 1911; Massachusetts, 1911; New Hampshire, 1911; Wisconsin, 1911; Michigan, 1912; Rhode Island, 1912; New York, 1913; Connecticut, 1913; Illinois, 1913; Nevada, 1913; Oregon, 1913; Texas, 1913; West Virginia, 1913; Iowa, 1913; Maryland, 1914; Hawaii, 1915; Wyoming, 1915; Colorado, 1915; Indiana, 1915; Maine, 1915; Montana, 1915; Oklahoma, 1915; Pennsylvania, 1915; Vermont, 1915; Kentucky, 1916; Porto Rico, 1916; New Jersey,[1] 1917; Nebraska,[1] 1917; California,[1] 1913–17; Delaware, 1917; Idaho, 1917; New Mexico, 1917; South Dakota, 1917; Utah, 1917; Virginia, 1918.

In other foreign countries the dates were: Austria, 1887; Finland, 1895; Italy, 1898; Holland, 1901; Greece, 1901; Luxemburg, 1902; Hungary, 1907; Serbia, 1910; Switzerland, 1911; Germany, 1911[2]; Roumania, 1912; Russia, 1913[3]; Norway, 1915; Cuba, 1916.

It is to be noted in the case of the United States that in twenty of the Compulsory Insurance States "self-insurance" may be permitted. In effect "self-insurance" is non-insurance. It is only permitted on proof of solvency or deposit of security. Self-insurance, as an exception from a Compulsory Insurance law, only seems justifiable in cases where the employer is *e.g.* a railway company

[1] These States were transferred from the Voluntary to the Compulsory Insurance list by the Acts of 1917.

[2] Replacing a series of laws beginning with that of 1884.

[3] Replacing law of 1903.

with a very large body of employees over which to spread the risk.

Methods of Compulsory Insurance.—The statutes which prescribe compulsory accident insurance have resort to insurance institutions which may be any of three forms, namely (*a*) State Insurance; (*b*) Employers' Mutual Insurance; (*c*) Private Insurance Companies.

Furthermore, a distinction must be drawn between (i) Compulsory Insurance—which enforces insurance and prescribes the insurance institution, and (ii) Compulsion to Insure—which enforces insurance, but leaves the employer free to choose his insurance institution.

Generally, in cases falling within category (i), the prescribed form of insurance is a State monopoly or an employers' mutual association under State control. In cases in category (ii) insurance is as a rule allowed in mutual associations or private companies with which in some cases State institutions compete.

The Compulsory Insurance provisions of the Compensation laws of the various countries (excluding the United States) fall into the following classification:

(i) Compulsory Insurance in prescribed institutions: (*a*) In a State institution with a monopoly of insurance: Switzerland, 1911; Ontario, 1914; Nova Scotia, 1915; Norway, 1915; British Columbia, 1916. (*b*) In Employers' Mutual Associations: Austria, 1887; Luxemburg, 1902; Hungary, 1907; Serbia, 1910; Germany, 1911; Roumania, 1912; Russia, 1913.

(ii) Compulsory Insurance with choice of institution: (*a*) Private Companies or Mutual Associations with competing State institution. Italy, 1898; Holland, 1901; Victoria, 1915; Queensland, 1916. (*b*) Private Companies or Mutual Associations without State competition. Finland, 1895; Cuba, 1916.

When considering the compensation laws of the United States, it has to be remembered that each State has its own law, and that as a rule one State considers itself under no obligation to adopt the legislation of its neighbours; also that in a majority of States the Act is elective, *i.e.* the employer has, in respect of the whole Act, the option of accepting or rejecting it.

Broadly the laws of the various States fall into the following classification:

(i) There are six Compulsory Insurance States where employers must insure in the State Fund: Nevada, 1913; West Virginia, 1913; Oregon, 1914; Porto Rico, 1916 (Compensation Law elective in the foregoing four States); Washington, 1911; Wyoming, 1916.

(ii) There are eight Compulsory Insurance States possessing a State Fund which competes with private insurance companies: Colorado, 1915; Maryland, 1914; Michigan, 1912, am. 1915; Montana, 1915; New York, 1913–6; Pennsylvania, 1915; Ohio, 1913 (only permits mutual associations); California, 1917; Idaho, 1917; Utah, 1917; Virginia, 1918.

(iii) Three States have mutual insurance companies which compete with private companies: Massachusetts, 1911; Texas, 1913; Kentucky, 1916.

(iv) In the remaining States insurance is left to private companies.

Other American States have shown some amount of hesitation in following the example of those which embarked on the experiment of a State Fund. Thus, Louisiana appointed a Commission which reported in 1914 in favour of waiting for further experience as to State insurance. In 1915 Missouri and Tennessee received similar advice from their respective Commissions. In 1913 the Maryland Commission had reported in a similar sense, but nevertheless the law of 1914 established a State Fund as one of the methods of securing compensation. In 1915 Kentucky reported adversely to a State monopoly of insurance, but adopted one of the few mutual systems found in the United States. Michigan permits a great variety of methods with the avowed object of obtaining experience for future use.

Two Canadian investigations have, however, yielded much more definite results. The Commissioner appointed by Ontario reported in 1913 in favour of compulsory State insurance, and included in his report the recommendations of the Canadian Manufacturers' Association in favour of a State system as well as the commendation by organised labour of the Washington law.

In 1915 the committee of investigation appointed by British Columbia reported in the following sense: "The exclusive system of Washington was said to be satisfactory to representative employers and the representatives of organised labour alike; while in Ohio,

where the State system is not absolutely but practically exclusive, it was found that the efforts of the stock companies to secure a wider range of activities were unanimously opposed by the Ohio Manufacturers' Association, and by the representatives of organised labour before the State Legislature, so that the efforts were unsuccessful." The Report states as the reason for failure of the more general acceptance of the State system " the strenuous opposition of casualty insurance companies," which, " by bringing their enormous influence to bear, succeeded in most instances in preventing the enactment of an exclusive law." Greatly reduced premium rates, and a correspondingly large aggregate of savings, are noted in the States having dominant State systems. Comparing the experience under the State insurance system of Oregon with that of Wisconsin, where there is free competition of insurance companies, " we are told that it cost Wisconsin employers insuring in stock companies in 1914 an average of $2.07 to place $1 of benefits in the hands of injured workmen, while in Oregon it only cost $1.13 ; a total saving in the year's business in Oregon of $351,522 as compared with the Wisconsin method." The committee was, therefore, unanimous in its recommendation for an exclusive State-administered fund, as not only saving to the employers large sums of money, but also contributing " greatly to the success of the Act as a whole by eliminating many undesirable features usually attendant on the competitive company system." [1]

In the Acts in the various Provinces of the British Dominions, the English Acts, the 1897 Act and the 1906 Act, have hitherto been followed. Those were the models for the Acts that exist in Australia and that existed in the various Provinces of Canada. But recently in Canada, in revising the Workmen's Compensation Legislation, Ontario, Nova Scotia, British Columbia, Alberta, and New Brunswick have turned away from the British Act of 1906 as the model and followed the American form of legislation.

There was first of all the Ontario Act of 1914. That was copied by Nova Scotia in 1915, by British Columbia in 1916, and by Alberta and New Brunswick in 1918. These Acts incorporate the main characteristics of the American law. In the first place the administration of the Act is given to a Board, a Board generally of three officials appointed by probably the Governor. In the second

[1] *Bulletin of the U.S. Bureau of Labour Statistics*, No. 203, p. 41.

place a State accident fund is organised, and that fund is supported by contributions from industries. The industries are classified for the purpose of fixing premiums according to the risk in the particular industry. The Board makes an estimate at the beginning of each year of the amount that is likely to be required for compensation during the coming year, and a levy is made on the various employers who are subject to the law, which levy is founded on the pay-roll, as modified by the risk rates, and in that way an accident fund is constituted. It is levied upon the different industries, and the different industries are graded according to the risk. In Washington, when this was first instituted, the funds got into difficulties because each fund in Washington was self-contained, and the powder industry fund came to grief because there was an explosion which caused a large number of casualties, and the fund that had been constituted for the purpose of that particular industry promptly became insolvent. That was speedily remedied by making the whole of the funds of the various industries available for the purpose of meeting liabilities. That is provided for in the Canadian Acts. They also capitalise reserves for the purpose of future payments. In the German system that is a point of serious criticism. The German legislation does not think it generally necessary to capitalise reserves for the purpose of meeting future claims. A workman who has been permanently injured may draw an annuity. Strict actuaries would say that when that man is awarded his compensation there should be in the fund from which his compensation is drawn a sufficient reserve to meet his particular case, and to provide that he shall certainly be able to look forward to drawing his pension, and that the reserve is there to back it. The Germans consider that is not necessary in a system of Compulsory Insurance, which does not allow employers to come in as they choose. The whole body of employers is constantly at their disposal, and that being so it is not necessary to capitalise future liabilities. They therefore only insist on employers providing for payments actually made during the past year. In Canada that is not considered to be sufficient. They capitalise any liability in respect of future payments. A section in that sense is included in the Canadian Acts as distinguished from the German method.

Manitoba stands by itself. There was an amending Act in 1918, but the principal Act is 1916. In Manitoba there is, in the first place,

a Board which is given power to fix the rates of premium, and the Province contributes towards the cost of administration. An accident fund is established, but the contributions to that fund come from insurance companies and from employers carrying their own insurance. The compensation is payable from the accounts of each insurance company, which accounts are kept by the Board. The Board keeps in hand enough money to meet the payments that may be due by the various insurance companies or employers that are included in its scope. Each employer has to furnish to the Board a statement of his pay-roll, and he has also to hand in with that statement a policy of insurance with an approved company or underwriter providing for the payment of the compensation for which he may become liable. The Board controls the insurance company even to the extent of fixing the rates of premium. There is an administration fund, which, again, is at the expense of insurers. These are self-insurers and insurance companies, and they pay $7\frac{1}{2}$ per cent. on the premiums for the purpose of supporting that fund, so that the Manitoba scheme is self-supporting.

The main considerations to be taken into account when weighing the respective characteristics of the different systems are :

(*a*) On the employers' side : the comparative cost of insurance.

(*b*) On the workmen's side : the speed and fairness with which claims are adjusted.

(*c*) Generally, the elimination of unnecessary litigation and the prevention of accidents.

With regard to (*c*) in Canada, and in the United States, they have provisions which require the employer to take definite steps to use safety appliances and generally to conduct his business in a manner involving a minimum risk of accident. That is one of the things dwelt upon by advocates of mutual insurance and insurance by a State fund.

As between the three systems of insurance the main distinguishing characteristics are :

(*a*) State Insurance : fixed premiums ; assumption of risk of fluctuating loss ; does not contemplate profit.

(*b*) Private Insurance Company : fixed premiums ; assumption of risk of fluctuating loss ; operates for profit.

(*c*) Mutual Association : losses distributed after their occur-

rence ; no fixed premium ; does not operate for profit nor does it contemplate a deficit.

It is to be noted that the existence of State insurance is not incompatible with voluntary insurance. State institutions compete with private companies or mutual associations in France, Sweden, and California, each of them countries where insurance is or was voluntary.

Necessity for State Insurance.—State Insurance Funds or State-controlled Mutual Associations are made directly necessary by Compulsory Insurance. If the State imposes upon employers the obligation to insure, the State in turn incurs the obligation to provide the employers with the means of insuring. Otherwise an employer may find himself in the position of one who is required by law to insure, but is unable to find an insurance company that will carry his risk ; for private companies are under no obligation to accept every risk that is offered. Again, private companies are profit-making concerns. Employers may reasonably object to compulsory contributions to shareholders' profits. Furthermore, under a system of Compulsory Insurance, the premium is in the nature of a tax the revenue from which is destined to be applied for the benefit of injured workmen and their dependants. The farming out of any form of taxation is out of harmony with modern political conceptions. In addition to these questions of principle, considerations of expediency enter into the problem. For instance, the Report of the Employers' Liability Commission for New Jersey in respect of 1914 and 1915, in urging the introduction of a compulsory system of insurance, remarks that " the establishing of a State Fund would seem to be essential to ensure equitable rates on the part of the privately owned companies and associations and to prevent the establishment of a monopoly, by agreement or otherwise, by these companies." And the statement is made that in California the mere establishment of a State Fund " caused compensation rates for the year 1914 to be reduced about 25 per cent." [1] There being this obligation upon the State, the question which emerges is whether the State Fund or the State-controlled Mutual Association should be given a monopoly of the business or whether competition by private companies should be permitted.

[1] *Workmen's Compensation and Insurance.* By D. H. Van Doren. New York (1918), p. 142.

Monopoly or Competition.—The stock arguments on the subject of monopoly and competition are well known and need not be repeated here. The point specially to be borne in mind is that a State-controlled monopoly of insurance would exclude from the business of compensation insurance all private companies; and the question to be determined is whether employers should be deprived of the opportunity of taking advantage of the benefits which private companies claim to be their peculiar attraction.

The merits of private enterprise as manifested in Workmen's Compensation Insurance Companies are claimed to be:

(i) Financial stability by reason of (*a*) possession of invested capital and surplus which serves as a guarantee or offset against inability always to depend against the law of average and against ill-judged underwriting; (*b*) possession of adequate reserves, which ensures continued solvency; (*c*) wide distribution of risk.

The lack of these, with the absence of a real State guarantee of solvency, are alleged to be the chief demerits of State insurance, and of Employers' Mutual Associations.

(ii) Efficient service by reason of (*a*) presence of conditions which encourage able management; (*b*) possession of experience and organisation for encouraging employers to adopt safe practices and safety devices; (*c*) possession of a staff trained to deal promptly with and efficiently to investigate claims; (*d*) competitive necessity to effect prompt and liberal adjustment of genuine claims; (*e*) the agency system; (*f*) adaptability to any variety of obligation.

(iii) Greater value for premium cost by reason of superior security and service, mere cheapness at the expense of security and service being false economy.

The advocates of a State monopoly of compensation insurance will dwell on the necessity of attracting business to the State Fund if it is to be successfully worked and point to the difficulty of so doing if the competition of private companies with their pushing methods of acquiring business has to be faced. One of the main attractions of the State institution is the relative cheapness of the insurance it offers. That relative cheapness largely results from the absence of the army of agents and brokers whose commission is so large an item on the expenditure side of private insurance companies. If the State institution joins battle with the private company with the same weapons, its special attraction, that of relative cheapness,

is in danger of disappearing. If it passively waits for business, the danger is that it will be left with all the undesirable risks which the private company has rejected.

The reason which induced the authors of the German insurance legislation to decide on a monopolistic system are set forth in the following extract : [1]

"The most important feature of this plan of organisation is that the employers manage their own insurance; private accident insurance companies are excluded from this business, and are not even allowed to compete with the employers' accident associations. The report of the Parliamentary Commission of 1884 gives at some length the reasons for this policy. Having decided that accident compensation should be paid in the form of annuities, the question of absolute security becomes paramount; at any time, the report states, a great accident might force a private company into bankruptcy, thus throwing upon charitable agencies both the victims of that accident, and all persons then upon the company's annuity roll; neither could government regulation of the private insurance companies prevent them, in certain cases, from deteriorating rapidly. The report also calls attention to the tendency of insurance by contract with private companies to lay undue stress on legal technicalities and to force the parties claiming insurance benefits to have recourse to courts. There is also a tendency for private insurance companies to seek only the good risks, so that the poor risks would find it difficult to obtain a reasonable rate under such a system. The reasons for not allowing the private companies to compete with the accident associations are also stated; the private companies during the first few years would endeavour to insure the largest possible amount of business by underbidding the accident associations with the hope of later making up the loss by raising the rates: they would of course be able to get the good risks without any trouble."

There is abundant evidence that both State-controlled Mutual Associations and State Funds, whether as monopolies or in competition with private enterprise, are capable of success, though each method has its enthusiastic advocates.

Forms of State Insurance: The German System of Mutual Insurance.—The first German Accident Insurance Law was that of 1884. The present law is part of the Workmen's Insurance Code of 1911, which comprises sickness, accident, and invalidity insurance. The complete Code consists of 1,805 clauses, covering 243 pages.

[1] *Twenty-fourth Annual Report of the U.S. Commissioner of Labour*, p. 1027.

Accident insurance is comprised in clauses 537–1225.[1] It is a system of Mutual Insurance on the monopolistic plan.

Supervision over the administration of all three branches of the Code is exercised by: (*a*) The Local Insurance Offices. (*b*) The Superior Insurance Offices. (*c*) The Imperial Insurance Office.

The administrative bodies for accident insurance are the directorates of the Employers' Mutual Trade Associations.

The Employers' Mutual Trade Associations are the insurance carriers for accident insurance. They may be shortly designated Accident Associations. They are constituted on a trade basis. Accident insurance includes within its scope the industries and occupations in a scheduled list, and an Accident Association includes all the establishments in the prescribed area of the branch of industry for which it was created. In other words, each undertaker whose establishment belongs to the branch covered by it, and in whose territory the establishment is situated, is a member of the Accident Association. They regulate their internal administration and their order of business through a constitution drawn up in general meeting.

The administrative body of the Accident Association is a board of directors consisting of employers. Any employer of an insured workman is eligible for membership. The office is an honorary one, expenses alone being refunded, and election, which is by proportional representation, can be refused only on good cause shown. A member who fails to perform his duties may be fined by the president.

There are subsidiary organisations of the Accident Association called Branch Institutes, the special purpose of which is the provision of insurance for the smaller businesses, especially in the building and hauling trades and inland and marine navigation.

The Local Insurance Office is a department of the "inferior administrative authority," that is to say, the local Government authorities in the towns and communes. The head of the inferior administrative authority (the Mayor or sub-prefect) is *ex-officio* president of the Local Insurance Office. He is assisted by a panel of assessors or associates numbering at least twelve, half repre-

[1] A translation into English of the Workmen's Insurance Code of Germany of 1911 is contained in *Bulletin* No. 96, September 1911, of the United States Bureau of Labour (*House Documents*, vol. xc.).

senting employers and half insured persons. Of these associates half represent accident insurance. The office of associate is honorary. Certain matters are determined by committees consisting of the President of the Local Insurance Office and two associates, one representing employers and one insured persons. For example, the " decision committee " is designated the authority to decide disputes between the communal authority and persons claiming benefits under the various forms of insurance.

The Federal State or the communal authority defrays the cost of the Local Insurance Office ; but the Accident Associations meet the cost of judicial matters.

The Superior Insurance Office acts as the higher judicial, decision, and supervision authority. Its area is as a rule that of the " higher administrative authority," that is to say, the area administered by a Governor representing the central Government. Its organisation is similar to that of the Local Insurance Office. It has a president and it includes " members " (officials) and associates representing employers and insured persons equally. Certain defined business is discharged by " chambers " consisting of the president and two representatives of employers and two of insured persons. The " decision chamber," for example, elects for four-year terms the medical experts to be summoned when necessary.

The Federal State defrays the cost, save in judicial matters, when the insurance carrier concerned pays costs.

Inter alia the Superior Insurance Office decides appeals from the Local Insurance Offices : in general it also determines appeals against the decisions of the Accident Associations.

The Imperial Insurance Office at Berlin is the highest authority in judicial, decision, and supervisory matters. It has permanent members (appointed by the head of the Imperial Government) and non-permanent members (eight elected by the Federal Council, twelve representatives of employers and twelve of insured persons), who receive an annual allowance and expenses. The cost of the Imperial Insurance Office is borne by the Empire.

The Imperial Insurance Office is the supervisory authority of the Accident Associations, that is to say, it sees that the constitution of the Association and the law are observed. It also hears final appeals from the " chambers " of the Superior Insurance Offices.

The Accident Association either in general meeting or by its directorate forms risk classes, according to the degree of risk of accident for the different establishments in the Association, in the form of a risk tariff, and it grades the contributions. The tariff requires the approval of the Imperial Insurance Office.

The basis of assessment on employers is the amount of wages paid as modified by the risk tariff. The purposes for which funds of the Accident Association may be expended are an indication of the scope of its activities. They include cost of compensation and administration; accumulation of reserves; rewards for rescuing injured persons; accident prevention; securing employment for injured persons; medical and convalescent institutions; homes for invalids and orphan asylums, maintenance in which may be granted as a form of compensation.

The amount to be raised is that required to meet the needs of the preceding financial year. Only in the case of the Engineering and Excavating Associations is it necessary to capitalise pensions granted during that year, and only in the case of certain branch institutes are there fixed premiums.

Compensation is paid through the Post Office in the district where the beneficiary resides and reimbursement is made by the Accident Associations.[1]

Accident insurance is applied to agriculture in a separate part of the Code. The financial organisation and general administration follow the plan already described for other industries. Employers are required to become members of Mutual Accident Associations, which, however, are organised according to territorial districts.

The Navigation Accident Association is also the subject of a special body of law. Here again the organisation follows the general lines, but the low profits and high-risk rate of the industry make it necessary to place the burden of half the premiums on the coastal communes, the apportionment of the contributions being according to the number of insured persons engaged in the different districts.

Accidents must be reported by the employer to the local police

[1] Testimony to the willingness with which the contributions under the Insurance Laws are borne is contained in an English Parliamentary Paper (Cd. 5679), *Insurance Legislation in Germany. Copy of Memorandum containing the opinions of various authorities in Germany* (1911).

authority, and to the Accident Association. The police investigate the accident and report to the Association. The directorate of the Accident Association determines benefits under accident insurance on the initiative of the proper officials, but if witnesses have to be examined on oath that duty is undertaken by the Local Insurance Office.

Claims for compensation are in the first instance presented to the Accident Association, which must embody in a written communication its decision whether the application is granted or refused.

Against an adverse decision the beneficiary may lodge a protest with the Accident Association, which gives him the right to a hearing in person, before the Accident Association in certain circumstances, before the Local Insurance Office in others. Thence an appeal lies to the Superior Insurance Office, which is heard by the " Judgment Chamber." The associates summoned to assist at the hearing are persons belonging to establishments resembling that where the accident arose. Save in certain specified cases, there is a final appeal to the Imperial Insurance Office.

If the contest involves a question of law, as distinguished from an application for oral proceedings as above-mentioned, the Imperial Insurance Office is the authority which decides.

The benefits provided.—In fatal cases, in addition to funeral benefit, amounting to one-fifteenth of the annual earnings of the deceased, there is granted to the widow until her death or re-marriage, and to each child up to the completion of the fifteenth year, a pension of one-fifth of the annual earnings, but the pensions of the survivors may not together exceed three-fifths of the annual earnings.

The only provision for commuting pensions thus granted is that by which, if a widow remarries, she receives three-fifths of the annual earnings in settlement.

For injury resulting in incapacity the injured person receives from the beginning of the fourteenth week after the accident medical treatment, and a pension during disablement, unless free medical treatment and maintenance in an institution are given instead.

For total disablement there is granted a " full pension," *i.e.* two-thirds the annual earnings, annual earnings being computed in the manner prescribed by the Code.

For partial disablement there is granted a " partial pension " ; it is proportionate to the loss of earning power.

If the injured person is helpless and requires the services of others, the pension may be increased, the full annual earnings being the maximum.

If through no fault of his own the injured person is unemployed, the partial pension may be temporarily increased to a sum not exceeding the full pension.

The only provision for substituting a lump sum for the pension is that by which, if the pension of the injured person amounts to one-fifth of a full pension or less, then the Accident Association, with his approval and after a hearing by the Local Insurance Officer, may award him a capital sum corresponding to the value of his annual pension.

There is, moreover, a general provision relating to foreigners. A foreigner entitled to a pension, who resides out of Germany, can with his consent receive a sum in settlement equal to three times the amount of his annual pension, and without his consent he may be paid a capital sum corresponding to the value of his annual pension.

Austria.—The system of voluntary accident insurance which had long been in existence in Austria having proved unsatisfactory, a law prescribing Compulsory Insurance in respect of industrial accidents was passed in 1887.

The Austrian law was modelled on the German law of 1884, but with minor modifications, with the object of organising it on a territorial basis.

The Swiss National Accident Insurance Fund.[1]—In 1912 Switzerland accepted by a referendum vote a law providing for sickness and accident insurance. Compulsory Insurance in the National Fund is prescribed for all employees in the particular industries to which the law applies. Others, those engaged in agriculture, for example, may be insured voluntarily. In regard to Voluntary Insurance it is provided that, on application, the National Fund shall insure against accident every person not compulsorily insured who is at least fourteen years of age, so long as such person resides in Switzerland; and in regard to premiums, that the Confederation shall contribute one-eighth of the total premiums of every person whose annual income does not exceed 3,000 francs.

[1] For an English translation of the Sickness and Accident Law of Switzerland, see *Bulletin of the United States Bureau of Labour*, No. 103 of 1912.

Accidents are classified as occupational and non-occupational. The former are broadly those arising in the course of the employment : others belong to the second category. It is laid down that the purpose of the Fund is to " conduct insurance on the mutual plan."

The Administrative Council consists of forty members, of whom twelve represent compulsorily insured persons, sixteen represent employers of compulsorily insured persons, four represent voluntarily insured persons, and there are eight representatives of the Swiss Confederation. Among its principal functions are to decree rules for the Fund, to determine classes of risks and premium rates, to hear appeals, to control finances, and to supervise the development of the Fund.

The Directorate charged with the duty of " managing and representing the National Fund " is appointed by the Federal Council on the recommendation of the Administrative Council.

Agencies constitute the local representatives of the National Fund. Each Canton is entitled to one agency.

Supreme supervision over the Fund is exercised by the Federal Council.

Premiums for occupational accidents are paid by the employers. Premiums for non-occupational accidents are paid as to three-fourths by the insured person, and as to one-fourth by the Confederation.

For the purpose of determining the premiums for occupational accidents the various kinds of enterprises are divided into classes of risks, and further sub-divided into degrees of risks by taking into account measures for the prevention of accidents.

For the purpose of determining premiums for non-occupational accidents, insured persons are divided by the Directorate into classes of risks according to their danger from non-occupational accidents.

A provisional estimate is made of the requirements of the National Fund for the coming year and the premiums regulated accordingly. An adjustment is made at the close of the year, and a supplementary levy made or a compensatory allowance granted in respect of the next provisional premiums according as a deficiency or surplus is shown.

The Confederation pays one-half the cost of the administration. It is also required by the law to furnish the Fund with a working

capital of 5,000,000 francs, and with a like sum for the creation of a reserve fund.

Every insured victim of an accident which results in incapacity must at once inform his employer. In case of death that obligation rests upon such survivors as are entitled to an annuity. The employer's duty is to report the accident to the National Fund. This accident is investigated by the authorities of the Fund, and for this the Cantonal authorities are convenient agents.

The Massachusetts Mutual Association.—The Massachusetts Employees Insurance Association, which was created by the Compensation Law of 1911, provides an instance of the results of competition between mutual insurance under State control and authorised private companies. It is a body corporate with a board of directors of not less than fifteen members. Any employer in the Commonwealth may become a subscriber. No policy may be issued by the Association unless there are at least 100 employers who have not less than 10,000 employees to whom compensation may be payable.

The State Insurance Commissioner licenses the Association to issue policies, and his approval is required for any proposed premium, assessment, or dividend. Rules and regulations are required to be made for the prevention of injuries on subscribers' premises.

The Board of Directors must distribute the subscribers into groups according to the nature of the business and the degree of risk, and subscribers within each group must pay annually the premiums required to pay the compensation for the injuries which may occur in that year. Assessments may be made for the payment of losses and expenses not otherwise provided for. Dividends may be distributed to policy-holders should the premium income exceed expenditure for claims after setting aside adequate sums for reserves and operating expenses. Premiums, assessments, and dividends are fixed by and for groups, but the whole funds of the Association and the contingent liability of all the members are made available in respect of claims. There is no State subsidy.

The President of the Massachusetts Employees Insurance Association has expressed [1] the opinion that " the employers must decide between stock insurance and mutual insurance as a means for working out in the future the lowest cost for workmen's com-

[1] *Bulletin of the U.S. Bureau of Labour Statistics*, No. 212 (1917).

pensation." Self-insurance he regards as "a dangerous experiment" for any employer smaller than the U.S. Steel Corporation, and State insurance "cannot hope to play any considerable part ultimately in reducing the cost of workmen's compensation insurance." Mutual-insurance companies, however, "have demonstrated that the compensation-insurance business can be administered by employers themselves, with high standards of efficiency, at an expense of about 15 per cent. of the premiums."

Financial criticism is met thus: "The results show that the employers of Massachusetts are entirely satisfied with the insurance protection afforded by the strong financial resources which the Mutual Companies have accumulated, by the legal reserves which they are required to carry, and by the strict supervision over them which is exercised by the State insurance departments."

Finally it is pointed out that the Mutual Company is conducted and controlled by the employers in their own interests.

State Funds.—The State of Oregon provides an example of State insurance monopoly. Employers within the Workmen's Compensation Law must insure in the State Fund. The following information in respect of the Fund is given by the Chairman of the Oregon Industrial Accident Commission.[1] The Act became effective from July 1, 1914, and during its first year there were 5,088 employers subject to the law. The end of the second year saw an increase to 6,532. "During the first year the law was in operation the injured workmen received in compensation benefits 88·3 per cent. of all moneys expended for every purpose, and during the year following this was increased to 91·3 per cent. The ratio of administration expense to moneys handled by the Commission the first year was 8·69 per cent., while the second year it was 8·71 per cent., the increased ratio of expense resulting from decreased income through reduction in premium rates." Future payments in fatal cases and in permanent disability cases extending over two years are secured by capitalising the liability and establishing a segregated fund.

New York is a State where private companies are allowed to compete with the State Fund. The Manager of the New York State Insurance Fund has placed it on record [2] that in pursuance of the practice of returning to the employers any surplus premiums

[1] See *U.S. Bureau of Labour Statistics Bulletin* No. 212.
[2] *U.S. Bureau of Labour Statistics Bulletin* No. 212.

remaining after payment of claims and expenses, policy-holders received during the first eighteen months of operation over $500,000 and " the State Fund has saved employers insured in it not less than $1,000,000 as compared with what the insurance would have cost them with the old-line companies. Further the State Fund might have saved at least $5,000,000 to other employers of New York State who were influenced to place their insurance with the old-line companies." Owing to extraordinary business conditions dividends were passed in the period ended June 1916, and reserves increased instead. Finally, " The State Fund of New York now has surplus and reserves for loss and catastrophe to the amount of over $2,000,000."

Ohio has a State insurance fund, and the only other form of insurance allowed is the mutual scheme, and that must provide benefits equal to those of the State Fund. Mr. Duffy, member of the Ohio Industrial Commission, refers to the State scheme as " a mutual insurance plan administered by and at the expense of the State. The law provides that each separate class of industry shall bear the cost of its own industrial accidents." But the surplus is not returned to the members in the form of dividends. Washington was the first State to adopt the industrial group plan, and a disaster causing many fatalities nearly brought one of the groups to grief. The division into forty-seven groups left some of them extremely small, certainly too small for a fair display of the principle of loss distribution. Profiting by this experience, the Ohio plan provides that while the premium rate for each class of industry is based on its own accident experience, employers of each and every class pay their premiums into one insurance fund, so giving the various groups " the advantage of a big insurance fund to protect them against the embarrassment of catastrophic losses." The Ohio State scheme is said to have been operated " at an expense ratio equivalent to 11 per cent. of the earned premiums." [1]

Italy has compulsory insurance, but permits employers to insure in a great variety of institutions. They may choose between (*a*) the National Accident Insurance Fund, (*b*) an authorised Insurance Company, (*c*) a Mutual Association, (*d*) a private Employers' Insurance Fund.

[1] *Monthly Review of U.S. Bureau of Labour Statistics* (May 1916), quoted in D. H. Van Doren's *Workmen's Compensation and Insurance*.

The Italian State insurance institution has operated since 1883, *i.e.* for fifteen years before the compensation law came into effect, and has enjoyed great popularity. In 1898, 160,000 working men were insured in that institution, and in 1906 over 400,000. Nevertheless private insurance companies still do a very large volume of business and Mutual Associations are growing. In 1899 the national institution compensated 20·8 per cent. of all accidents, the private companies 71·2 per cent., and the mutuals 8 per cent. In 1905 the proportions were 36·8 per cent., 43·9 per cent., and 19·3 per cent.

While in Italy there is compulsory insurance, private employers are at liberty to insure their employees in authorised private insurance companies if they prefer that method rather than insurance in the National Accident Insurance Institution. It is compulsory to insure in the latter only in the case of State or Local Government establishments. Furthermore, private establishment funds organised by employers with a minimum membership of 500, or employers' mutual accident insurance associations with a minimum of 4,000 employees, the authorisation of the Government being necessary in both cases, are permissible methods of insurance in lieu of the two methods first mentioned. These different forms of insurance are not related one to the other in any way, save that each is subject to strict Government supervision.

The National Accident Insurance Institution, however, has features which make it worthy of special consideration. It is an instance, of which Manitoba provides another example, of the intelligent use by the State of existing private institutions. In Manitoba, the insurance companies were pressed into the service; Italy has found a way of making use of the banks.

The Institution is a privately organised concern, and was established by Savings Banks and other private banking institutions for the purpose of taking over the system of voluntary accident insurance which existed in Italy from 1883 until 1898, when insurance became compulsory. The Executive Committee is the Executive Committee of the Milan Savings Bank. There is a superior council for general supervision, on which sit representatives of different banks, and these same banks act as local agents of the Institution. It is autonomous, but under Government control. It is self-supporting, there being no Government subsidy. Its income is mainly

derived from premiums paid by employers, who are subject to the Compulsory Insurance law.

State supervision begins with the requirement that new establishments must, within ten days of being opened, notify the Prefect of the Province as to their business, and the number of employees. Particulars must also be furnished of their insurance contracts.

Private insurance companies desiring to do accident insurance business must first obtain the authority of the Government. Accident insurance business must be kept separate from other business. Monthly reports with full particulars must be sent to the appropriate Minister, and there is a system of Government inspection. No premium can be altered, and no condition in a policy changed, without the consent of the Minister.

A Guarantee Fund is required which must at the end of the year amount to two-thirds of the premiums received during that year. The guarantee must be deposited in a prescribed bank in the form of State or guaranteed securities.

Employers' Voluntary Mutual Associations are subject to similar State supervision.

Choice of risk is not allowed to the National Institution in the case of trades compulsorily insured. Under the law of 1904 it must accept all insurance offered in the case of industries to which Compulsory Insurance applies, and the premiums are strictly regulated. But the Institution may undertake business from persons who insure voluntarily, and in the case of industries not subject to the compulsory law insurance may be declined if the risk is unfavourable and an adequate premium not paid.

THE STATUS OF THE SHANGHAI MUNICIPALITY.

[*Contributed by* R. S. GUNDRY, ESQ., C.B.]

THE Shanghai Municipality is a unique example of an International Consortium exercising executive authority within a district over which it has no territorial rights.

It was recognised, from the beginning of our treaty relations with China, that differences of law and custom required that foreign residents should be subject to their own laws administered by their own authorities, and that for similar reasons certain areas should be marked off at each treaty port within which they could live in their own way—apart from the crowded and insanitary conditions of Chinese cities.

Treaty Rights.—The principle, asserted crudely in an agreement (supplementary to the Treaty of Nanking) negotiated by Sir Henry Pottinger at the Bogue in 1843, was affirmed explicitly in American [1] and French treaties in the following year; and the areas known at Shanghai as the English, French and American Settlements were accordingly marked out, shortly after, in what were then cotton and rice fields.

Subsequent treaties negotiated by other Foreign Powers contain similar provisions, and some have chosen—at other ports—to mark off concessions [2] of their own. But all other nationalities that

[1] Art. 17 of the American Treaty of 1844 says: "Citizens of the United States . . . shall enjoy all proper accommodation in obtaining houses . . . or in hiring sites from the inhabitants on which to construct houses and places of business and also hospitals, churches and cemeteries. The local authorities of the two Governments shall select in concert the sites for the foregoing objects . . . ."

Art. 21 of the same Treaty says: " . . . Citizens of the United States who may commit any crime in China shall be subject to be tried and punished only by the Consul or other public functionary of the United States thereto authorised, according to the laws of the United States."

[2] The terms "Settlement" and "Concession" differ in that the former is an area set apart, wherein foreigners purchase sites from Chinese, and pay their own land-tax; whereas a "Concession" is an area granted at a total rent by China to a Foreign Power, which sublets to its subjects (and may be others—non-Chinese) and administers it under its own municipal regulations.

have since come upon the scene have sought hospitality within the great cosmopolitan Settlement which has been developed out of the original location, at Shanghai. Members of all these nationalities remain subject to the jurisdiction of their respective consuls and national laws; though the greatness of British interests led to the creation at Shanghai, in 1865, of a Supreme Court with judges having appellate jurisdiction over the consular tribunals at the several Treaty Ports; and the expansion of American interests led, subsequently, to the appointment by the United States of a judge having similar powers.

Municipal Government.—The necessity of setting up some form of Municipal Government within this area soon became manifest; and the Consuls of Great Britain, France and the United States (the only Powers which had, at that time, treaty relations with China) joined, in 1854, in drawing up a scheme of local administration under the title of "Land Regulations"—in respect to which H.B.M. Consul, Sir Rutherford Alcock, stated at the time that it was intended to give the Municipal Council then created entire control of the area set apart. The French shortly after withdrew from the Consortium, and have chosen to manage the area originally allotted to them in their own way, under a Code of Regulations promulgated from Paris which permits the election by the foreign residents therein of a Municipal Council consisting of four French and four members of other nationalities presided over by the French Consul-General. The British and Americans chose to amalgamate, raising a common revenue under a single municipal administration, and achieved a fusion so complete that the terms "British" and "American" have become little more than a convenient expressions to indicate a certain locality.

This Anglo-American area is administered under a Code of Land Regulations (rather more elaborate than those of 1854) which was approved by China as well as the then Treaty Powers in 1869, and has since been altered only in one or two formal points with their assent. That Code makes the district in question a Foreign Settlement—votes regarding municipal administration being confined to foreign residents for whom it was originally intended.

The Immigration of Chinese.—In course of time the conditions became complicated by the intrusion of a vast Chinese population who reside within it technically "as guests," having no part in its

administration. There were, even in the early 'fifties of the last century, a few Chinese living within the precincts of the Settlement; and it may be noted, in proof of the admitted thoroughness of foreign control, that they were only allowed to do so under permit, for which they paid $50 to H.B.M.'s Consul. A few years later an American subject obtained permission to build a market and other Chinese houses, and the example thus set was gradually followed. But the great inrush of Chinese began with the approach of the Taiping rebels in 1860–1. It is hardly an exaggeration to say that the surviving population of one, if not two, provinces flocked, then, to the one accessible spot which was deemed safe—being under foreign protection—from the spoliation and massacre which commonly attended the movements of the rebel and imperial forces. A certain number returned to their home-lands after the rebellion had been crushed; but thousands remained, and it soon became evident that, unless the characteristics of order and good government which we had created were to be undermined by the circulation and interference of Yamen Runners (*i.e.* underlings of the Chinese Magistracy) and official delegates from the adjacent city, some method of dealing with the new element, which might ensure foreign supervision without denying the authority of the Chinese officials over their own nationals, must be found. And so, in 1864, Sir Harry Parkes (then H.B.M. Consul) and Mr. Alabaster (then Vice-Consul) devised, in concert with the Taotai (the chief Chinese District Authority), a Mixed Court presided over by a Chinese magistrate delegated by the Taotai with a foreign Vice-Consul as Assessor, which, beginning its sittings (apparently without definite rules) at the British Consulate, grew in a few years to have a Court House and a tentative Code of Regulations of its own.

Mixed Court.—It may be desirable, in view of the use of the term "Mixed Court," in the Near East, for Courts administering a code applicable to the subjects of various nations—to explain, here, that the Shanghai Mixed Court was originally intended to administer Chinese law to Chinese subjects, living in the Settlement, and was called "mixed" because a foreign assessor sat to check and stiffen the Chinese magistrate. Time, however, and the tendency of good law, where ably and honestly administered, to drive out or supplement bad law, have brought the Court, at all events in commercial cases,

to base its decisions more and more on the principles of Western jurisprudence; and the assessors had come to act very much as co-judges when, at the outbreak of the Revolution in 1911, the Consular Body decided to issue (through the Municipal Council) a notice taking over control of the Court, which had been left, temporarily at any rate, in the air by the abdication of the Imperial Authorities.

The business and importance of the Court have developed, naturally, with the growth of the Settlement till it has come to fulfil a very important function, Endeavours have been made from time to time by the City officials to assert increasing authority, and under the Republic the return of control was demanded. This was made by the Powers dependent on the extension of the Settlement, for reasons which will be subsequently explained, and both questions have lately been under consideration and negotiation at Peking.

The Development of the Municipal Council.—The activities and responsibilities of the Municipal Council grew also, necessarily, with the growth of the Settlement, and had to receive extended recognition to enable it to exercise the fiscal and executive functions involved. The need was met, as we have seen, by the formal recognition of the Land Regulations by the Chinese Government, and by the Ministers of the several Treaty Powers under authority from their respective Governments, thus giving them the force of law which the several Consuls have power to enforce; though it is a testimony to the good sense of the community that the appeal has rarely to be made.

The importance of the interests at present involved may be inferred from the fact that the population of the International Settlement amounted, at the date of the last census (in 1915), to 18,519 foreigners and 620,400 Chinese. The police force, upon whom the maintenance of order in this great community depends, has grown necessarily with its expansion, and partakes in its constitution of the cosmopolitan character of the Settlement itself. It numbered at the date (1915) of the last Municipal Report to which I have access, 286 Europeans (mainly if not exclusively British), 469 Sikhs, 29 Japanese, and 1,319 Chinese. The Council, which is elected annually by and from among the foreign residents under a certain recognised electoral franchise, comprises at present, I believe,

six British, two American and one Japanese [1]—the preponderating elements among the foreign population being thus roughly represented. A general meeting of foreign rate-payers is held annually to pass the budget and discuss any measures that may require consideration and sanction. The revenue, which amounted in 1917 to 3,455,128 taels [2] (equivalent at the present rate of exchange to more than £1,000,000 sterling), is derived chiefly from house and land taxes, wharfage dues on merchandise and various licence fees.

The Relation of the Municipal Council to the Consuls.—The requirements of a constantly growing population have led to more than one partial amendment of the so-called Land Regulations, and another element had quite early to be introduced; for the fact soon made itself manifest that the Council had no corporate capacity in which it could sue or be sued. It was agreed accordingly to set up a Court of Consuls, consisting of certain members of the consular body chosen by the Foreign Consuls from among themselves to act in that capacity. And that entailed another change: it accentuated the principle of cosmopolitanism, and the conduct of negotiations with the Chinese authorities respecting municipal affairs was allowed to pass out of the hands of the British and United States Consuls into those of the doyen of the consular body—who might, by accident of seniority, be the French Consul, and would thus be in a position of influence in the cosmopolitan Settlement while retaining the separate headship of his own Concession (which is, as we have seen, administered apart)—or might be the representative of the least interested of the Treaty Powers, while the preponderant interests of the original lessees become subject to differences of opinion among the remainder. Being conversant, however, with local conditions, the Consuls generally arrive at an understanding, both among themselves and with the Chinese. It is less easy, when something has to be referred for decision to the Ministerial Body—to most of whom the history and peculiarities

[1] The membership has been varied from time to time. There was customarily, before the war, a German member, who was replaced first by a Russian and subsequently by a second American; and occasion has been taken to introduce a Japanese member to represent the large and increasing number of Japanese residents.

[2] The value of the "tael" which is literally a Chinese oz. (= 1⅓ English oz.) of silver fluctuates of course with the relative values of the precious metals. It has been as low as 2*s*. 6*d*.; at present it is roughly 6*s*. 8*d*. = three to the £1.

of the Shanghai Municipality are naturally strange—at Peking, and various desirable amendments have been hung up, or left alone, on account of the difficulty of obtaining the assent of so many Treaty Powers, besides the Chinese Government itself, to any change.

The Extension of the Settlement.—Another revision which had become urgent, but to which the consent of the Chinese was not too willingly given, was the expansion of the Settlement to include, not only a greater area, but certain insanitary and ill-regulated Chinese villages on the outskirts that constituted so many harbours of refuge for Chinese loafers and criminals, who were thus able to place themselves beyond reach of the Municipal Police. The Chinese plausibly objected, when the question was mooted (in 1899), that the Settlement was already more than large enough for the foreign population, and that to extend it would be to include Chinese who presumably wished to stay outside. The obvious answer was that all available space inside was crowded with orderly Chinese, who clearly had wished to come in, and that the disorderly character of these outlying districts, which the City authorities appeared unable to regulate, constituted an annoyance and danger which could not be endured. The upshot was that a considerable extension was obtained after some negotiation; but one particularly noxious district was withheld on a question of magisterial boundaries. The administrative unit in China is a *hsien*; the Settlement had been carved, so far, out of the Shanghai *hsien*: a desiderated area named Chapei was in the adjacent Pao-shan *hsien*, and Superior Authority upheld the Pao-shan magistrate in his opposition. The question was agitated for several years, but practically solved itself in 1913, in consequence of an insurrection against the newly formed Republican Government, which obliged the Shanghai Volunteers (with the approval of the Consular Body) to occupy Chapei, to prevent it being constituted rebel headquarters. The Volunteers were wisely withdrawn, on the restoration of peace, in order to avoid any semblance of the use of *force majeure*; but the incident furnished an argument whose cogency the Chinese seem to have admitted; and the desired extension was, it is understood, eventually agreed to at Peking, though, for various reasons, the agreement was not at once put in force. The precise terms, I believe, have not yet been made public, but one condition insisted on by the Chinese authorities is said to be that the Mixed Court—the administration

of which the Municipal Council was, as we have seen, compelled by the chaos attending the Revolution to take over (under the direction of the Foreign Powers), shall resume its predominantly Chinese character. It will be regrettable if that is so, for the changes thus instituted have been of such advantage in the administration of justice to Chinese residents in the Settlement that even an extension of its area might hardly compensate for their loss. The delay has, further, afforded opportunity for an agitation in favour of admitting Chinese residents in the Settlement to a voice in muncipal control, which would have the obvious effect of swamping the foreign residents, and undermining the system which has gained for Shanghai the title of "Model Settlement."

The episode is illustrative, and may tempt us to examine a little more fully the most peculiar, perhaps, of the various peculiar features in the administration of the Municipality.

Authority over Chinese.—While the Chinese authorities were willing enough probably, at the outset, to surrender to foreign Consuls the right of jurisdiction over their nationals, and to have these live by themselves where they would not interfere with Chinese neighbours or embarrass the Chinese magistrate, it did not at all follow that they were equally willing to see a large and prosperous Chinese population transfer themselves and their tax-paying capacity to an area under foreign control. The position is incontestably anomalous: the whole situation and conditions of government in the Settlement are anomalous, resting—besides and beyond the Land Regulations—on an aggregate of precedents which are recognised as binding as well as on definite textual agreements. The whole system has grown up with the growth of the Settlement, and has worked well in the interests of both Chinese and Foreigners, because it has been worked with good-will by sensible men who wished to maintain good relations. It is an anomaly that some 620,000 Chinese should prefer to live within the precincts of the Foreign Settlement instead of in the adjacent Chinese city and suburbs. That they do so is due presumably to a latent appreciation of good order, good government, good roads, and immunity from squeezing and other forms of arbitrary annoyance. Hard-and-fast maxims of international law that may be perfectly applicable in Europe are unsuited to a situation which is probably unique. Where such great interests are at stake it is essential

that good order should be maintained, even if this involves an exercise of authority that cannot always be textually defined. It is out of a tacit recognition of these facts by both Chinese and foreigners that the prevalent conditions have been evolved; and it will be infinitely regrettable if a system which has worked so well for sixty years is allowed to be undermined out of deference to logically tenable, perhaps, but inapplicable theories.

Land in China belongs, as in India, nominally to the Emperor (or must we now say to the State ?) but is held on perpetual lease, which is equivalent practically to ownership. The land comprised in the Foreign Settlement at Shanghai was bought originally from its native owners for its full market value. There has been no attempt to contest the Imperial right of eminent domain. What has been done is to assert the exclusive municipal control prescribed by the Land Regulations, to levy municipal taxes, and to exercise a certain supervision over the execution of warrants issuing from the city for arrest of Chinese in the Settlement, and of sentences passed at the Mixed Court. The years have not passed without attempts by the local Authorities to encroach on this position, but they have been more or less spasmodic, and have in the main been successfully defeated. It is easy to conceive that the Chinese officials chafe to some extent at the limitation of their powers over their own nationals, and that the Yamen Runners, who live by bribery and extortion, resent the checks upon their activities. But to allow native officialdom free executive course would be to render municipal government impracticable, and to degrade the Settlement to the level of the Chinese city. The matter must be looked at from the standpoint, not of international theory, but of expediency. There is no security that a warrant issued from a Chinese Yamen may not have been obtained by corrupt means for purposes of extortion or private or official vengeance. The restraints which the Chinese dislike will fade automatically, as the extra-territorial rights enjoyed by foreigners will fade, when, if ever, the adoption of adequate administrative and judicial reforms by China herself renders them unnecessary. China "expressed a strong desire to reform her judicial system" to Sir Rutherford Alcock, then H.B.M. Minister, in 1868, to his successor, Sir Thomas Wade, again, in 1876, and the formula was repeated in the Mackay treaty of 1902. When that desire has been translated into action

the aspirations expressed by the Chinese delegates at the Paris Conference may be open to discussion, as a matter of practical politics, provided that established rights are safeguarded.

The Effect of the Administration.—That the Municipal Council should have successfully administered the affairs of this large and steadily growing community for sixty years is in itself a tribute to the excellence of its methods as well as to the good sense of the community and its representatives. An efficient system of drainage has been constructed. The streets have been well laid out, and are kept in excellent order. They are lighted both by gas and electric light. Good water is supplied by efficient water-works. A police force of mixed nationality maintains excellent order. There are admirable public parks and gardens. The river frontage has been embanked and planted, and there are convenient jetties and landing-stages. There is a well-organised volunteer force, which is relied upon as a reserve in case of local disturbance ; an efficient fire brigade, and, in fact, all the customary appurtenances of a well-administered European city.

It has been said, indeed, that the Shanghai Municipal Council are the best missionaries in China, as they offer to the myriads of Chinese who pass through the Settlement an example of what orderly and good government may mean. It would be infinitely regrettable if these results should be jeopardised out of sentimental consideration for susceptibilities which would deserve more respect if they found expression in reforms that would automatically bring about the results the claimants desire. The wish to throw off all semblance of tutelage and stand out in every respect independent and equal may quite probably be stimulated by the exemplar of Japan ; but the retort is obvious that, if China had emulated Japan in reforming zeal, she might have attained simultaneously a similar end. That certain amendments in the existing Regulations are desirable in the meantime is beyond doubt ; though it may be questionable whether the difficulty of getting fifteen or sixteen Treaty Powers, as well as the Chinese Government, to assent to any form of revision would not be so great, and involve the resuscitation of so many contentious propositions, that it will be wiser to leave well alone, and persevere with conditions that have stood the test of one cycle, and will endure doubtless for another, if administered with similar discretion.

THE CONSTITUTION OF URUGUAY.

[*Contributed by* WYNDHAM A. BEWES, ESQ.]

THE Constitution of 1829, which may be considered as a liberal constitution, given the circumstances of the time and the state of thought in matters governmental, did service foi nearly ninety years, and has now been replaced by the new Constitution of 1917, which came into force on March 1, 1919. It is not surprising that many changes of great importance have been made, and as was to bé expected, in view of the advanced ideas of the Republic, all of them have been conceived with a democratic tendency and most are based upon the principle of government by the people, and for the people.

Religion.—In the domain of religion, the Constitution of 1829 acknowledged that of the Roman Catholic Church as the religion of the State; but other cults were not prohibited, and freedom of thought and expression by word of mouth, writing, and print, was guaranteed by Art. 141. The present Constitution (Art. 5) recognises all religious cults as free, leaves the ownership of its places of worship, paid for by the State, in the hands of the Roman Catholic Church, except those attached to public establishments, and declares all places of worship already consecrated free from taxes of all kinds. At the same time it enables members of the regular and secular clergy to be elected to the House of Representatives (Art. 23) and ceases to concern itself with the admission or reception of Papal bulls and briefs (Art. 98 repealed). Neither the President, Senators, nor Representatives are now required to take oath on assuming office (Arts. 74, also 33 of the old text). The President, *inter alia*, no longer swears to protect the religion of the State (Art. 76 of 1829).

Voting is by ballot on the principles of proportional representation and universal male suffrage, members of the police and military

forces being forbidden all public political acts, save actual voting (Art. 9). Provision is made for future female suffrage on its being passed by a majority of two-thirds of the members of each Chamber. (Art. 10).

Citizenship.—Citizens by birth are declared to be not only all persons born in the Republic, which was the law before, but also all children of an Uruguayan father or mother, wherever born, who become inhabitants of the country and inscribed on the Civil Register (Art. 7). The existing facilities for foreigners with some occupation or property in the country to become citizens are continued (Art. 8). The suspension of citizenship by the receipt of wages, by vagrancy, inebriety, absence of elementary education, bankruptcy or indebtedness to the Treasury is abolished, and citizenship commences at the age of eighteen instead of twenty. (Art. 11) It is no longer lost through a sentence involving infamy, nor through fraudulent bankruptcy, nor through obtaining employment, distinctions, or titles from other Governments (Art. 12). It is recovered by becoming domiciled in the Republic and inscription in the Civil Register (*ib.*).

Government.—S. 3 treats of the form of Government, which is declared to be representative and democratic, and of the form and attributes of the Legislative, Executive, and Judicial branches. The powers of the General Assembly, consisting of two Chambers, one of Representatives and one of Senators, are hardly altered. Representatives are no longer required to possess a property qualification. Senators, as before, are chosen by indirect election. Both Senators and Representatives are paid, as was also the case before.

A bill which is returned by the Executive Powers with objections and criticisms may be passed, altered or unaltered, by the votes of three-fifths of the members present in the General Assembly of both Chambers, and by a majority vote if the difference is confined to the question of the promulgation of the law (Art. 62 and 68).

Executive Power.—S. 7, which deals with the Executive Power, embodies very considerable changes, as this Power is no longer conferred on the President alone, but on him and the new National Council of Administration (Art. 70). The President is no longer to be elected by the General Assembly, but by a direct majority vote of all electors (Art. 71). He may not be re-elected, even after an interim Presidency, until eight years (instead of four) have

elapsed (Art. 73). He retains in general the same powers as before, through more exactly expressed, but for concluding Treaties he requires the assent of the Council and the approbation of the Legislature. He is bound to afford the assistance of the State forces when required by the Council or the Judiciary (Art. 79). He can only be impeached at the instance of the Chamber of Representatives (Art. 81).

National Council of Administration.—The National Council of Administration is a new body, the constitution and powers whereof are regulated by s. 8, the power of appointing Ministers and of dismissing them being removed from the competence of the President. This National Council is composed of nine paid members elected, with their respective under-studies (to borrow a theatrical term), by direct popular vote on the last Sunday in November (Art. 82), coming into office on the following March 1 (Art. 87). They hold office for six years, but every two years one-third of the members retire, and are not eligible for re-election for another two years (Arts. 85, 88). All State powers, which are not expressly reserved to the President or other authority, are confided to the Council, such as control of public instruction and works, labour, industries, the Treasury, public health, the budget, and arrangements for holding elections. For financial matters, whether internal or international, the assent of the President is required, but his dissent may be overridden by the vote of two-thirds of the members (Arts. 97, 98). Separate boards are to be appointed by the National Council for industry, education, and public health (Art. 100). The members have the same immunities as have the Representatives and Senators (Art. 102). The Council may authorise its individual members to attend the sittings of the Chambers, but without power of voting (Art. 103).

The Ministers, other than the Secretaries of the President of the Republic, are to be appointed by the National Council (Art. 105), and, if members of the Legislature, their functions as such are in suspense, they having the right to attend but not to vote at the sessions of the Chambers (Arts. 111, 112). They are among other things responsible for the initiation of legislation, directing payment of State debts, and signing under their responsibility the decrees and orders of the President and National Council (Arts. 106, 113).

The Judges of the High Court of Justice, the Courts of appeal

and first instance, are appointed by the General Assembly as before (Art. 118). The High Court of Justice has no longer the duty of advising the Executive on the admission of Papal bulls and briefs.

Representative Assemblies.—The *Jefes politicos* of the Departments are replaced (s. 11) by Representative Assemblies and autonomous Councils of Administration, chosen by popular election. Foreigners may be given this suffrage by law. The Assemblies have the right of taxation, except by way of transit duties and interdepartmental imposts. Their determinations on this subject are appealable to the Legislative Power by certain stated minorities. The functions of the Assemblies are honorary, and those of the Council members are paid. Twenty-five per cent. of the persons inscribed on the local Civil Register may initiate matters of local interest.

The Chief of Police and his force in each Department are directly subordinate to the President of the Republic, and are paid out of Federal Funds (Arts. 143–5).

The death penalty is made unconstitutional by Art. 163, which further proceeds to declare that the prisons are to be used only for safeguarding defendants and convicts, and not to humiliate them.

Art. 169 is notably different from the former Art. 144. They both affirm that the right of property is sacred and inviolable, but while the old form set forth that "No one can be deprived thereof except according to law, and in the event of public necessity," the present form adds "or of public utility," which of course is the law in most parts of the world, but in this country the addition may have been prompted by the proposition made a few years ago to expropriate insurance companies and form a Government monopoly.

It will be seen that the chief alterations concern :

(1) The abolition of State religion.

(2) Popular election of the President.

(3) The formation of the National Council of Administration, popularly elected, with the right to appoint Ministers.

(4) Abolition of the *Jefes politicos* of the Departments and the institution of popularly elected Representative Assemblies and Councils of Administration.

THE COMMERCIAL CLAUSES OF THE GERMAN AND AUSTRIAN PEACE TREATIES.

[*Contributed by the* HON. H. FLETCHER MOULTON.]

THE Armistice was signed on November 11, 1918; the German Peace Treaty on June 28, 1919; the Austrian on September 10, 1919. Diligent readers of the public Press will have been fully instructed as to the dilatoriness, almost amounting to criminality, which could alone account for these long intervals, and of the multitude of evils resulting therefrom. But at times one is apt to wonder whether our journalistic instructors have fully grasped the magnitude of the treaty-makers' task. Apart from the larger questions, such as the League of Nations, Reparation, and the Partition of Europe—questions to which the Fleet Streets of the various capitals could undoubtedly have afforded prompt, if not, perhaps, identical solutions, the legal representatives of the High Contracting Powers had to face a less conspicuous, but perhaps even more difficult, task—the production of a code of laws to settle the commercial and private difficulties that had arisen through the war. The object of this article is to give a brief review of these commercial clauses.

The task was of the hardest. No mere adhesion to some theory of legal rights would suffice. To aim at preserving the *status quo*, or reviving the *status quo ante*, would have been alike useless. For five years all normal relations had been suspended, and in that five years every condition of life, every question of values, had changed beyond recognition. Under such circumstances the legislator had to become the physician, whose first duty was to heal the wounds of commerce that it might regain life and strength. Further, this code could not be drafted with reference to the law of a particular nation—it must fit with the laws of all, and each additional provision must be drafted with this in mind.

The problems that must arise were appalling in their number and complexity. A score of volumes might have been dedicated

to their solution. In fact, they are dealt with in some 30 pages, or about 20,000 words.

In the brevity of the code will be found, I think, its success. Some hardship, or even injustice, will harm commerce less than an orgy of litigation and years of uncertainty, and the aim of the draftsman has clearly been to reduce the questions to be decided to a minimum. Probably he will be found to have succeeded. The strokes of his brush have been bold ones, but the general execution is true and clear, and, though parts may merit criticism, a study of these clauses leaves an impression of honest endeavour and successful achievement.

So far as the commercial clauses are concerned the two treaties are so similar that separate treatment is unnecessary. The main provisions will now be reviewed.

Contracts.—Take first the question of contracts between subjects of Powers at war. Some such contracts were certainly ended by the outbreak of war, but as to many the most difficult questions of termination or suspension arose, In some cases the domestic laws of the parties differed. while some agreements, as for instance certain contracts as to the purchase of Australian metals, seemed to have been phrased by one of the parties with a foreknowledge of the war and a desire to avoid its effect. The settlement of these questions must have involved years of litigation and uncertainty.

But if the case of the contract which might or might not have survived was bad, the contract that had certainly survived would have led to results no less serious. During the stress of war contracts between citizens of the same State had continually to be varied to meet the changing conditions of life. Think, then, of the result if, after five years of war, when every condition of life had changed and the purchasing power of the currency of the various States had depreciated from 50 to 90 per cent., the parties to a contract had been called on to resume it on the old terms. An immense source of revenue would accrue to one party, only limited by the certainty of the speedy bankruptcy of the other.

The remedy adopted seems the only practicable one. All contracts between enemies are deemed to have terminated when they became enemies—with certain carefully defined exceptions. These exceptions are chiefly those of contracts which have been wholly or partially executed by one side, *e.g.* sales where the property has

passed, contracts of mortgage, pledge, or lien, mining concessions, and certain insurance contracts. Contracts with States or Municipalities, and leases of lands or houses are also excepted. Even these exceptions are subject to the domestic laws of the Allied or Associated States concerned. These contracts (except as stated) are thus terminated at a stroke, and the parties cannot found any claims on them, except in the case when a debt or pecuniary obligation remains unfulfilled.

Insurance Contracts.—One special class of contract demanded, however, exceptional treatment, viz. insurance contracts. In the case of life insurance the insured is allowed the option of paying up past premiums or of accepting the surrender value of his policy when it lapsed—fire policies are generally held to have continued in force, as are marine policies when the risk had attached at the outbreak of war. Where under these rules the insurer has been bearing a risk he is held entitled to premiums.

Allied and Associated States may demand that particular contracts should be kept alive in the general interest, and in such cases the parties may claim compensation.

Negotiable instruments come within the exception of pecuniary liabilities, and as between all enemies all periods for presentation, protest, etc., are extended till after the war.

Debts.—By far the commonest claim between private individuals is in the nature of debt. Here the States have assumed a responsibility which, though at first sight heavy, will probably be found to be most beneficial. All debts due before the war, or becoming due during the war between subjects of hostile States (subject to certain conditions as to residence) are guaranteed by the State of which the debtor is a citizen. Once the debt is admitted it will be immediately credited to the creditor's State and paid immediately to the creditor—irrespective of the solvency of the debtor. For the purpose of collecting these debts a simple Clearing Office System is provided, and in ordinary cases all that the creditor has to do is to send his claim in to his own office and the amount due will be paid out to him.

The risk run by the respective States is not great, since a very large part of the debts owing to their creditor subjects will be met by the amounts collected from their debtor subjects, and the Allied and Associated States have a further security for the balance,

should this not be met by Germany or Austria, in the fund formed from the liquidation of enemy property.

Through the Clearing Offices will also be settled claims against enemy Governments for the payment of sums which became due during the war in respect of securities issued by such Governments. The payment of such sums to Allied subjects is guarranteed unless payment of neutrals and enemy subjects was suspended.

Negotiable instruments will also be dealt with by the Clearing Offices, but the question of how far claims on such instruments come within the class of guaranteed debts is a very difficult one and too long to be dealt with here.[1]

Compulsory Liquidation of Enemy-owned Property.—The general question of reparation is one between the States, and as such lies outside the scope of this article. But the magnitude of the amount payable, and the difficulty—if not impossibility—of ever realising this amount, has driven the treaty-makers to adopt such measures as were possible to ensure payment of at least a portion. One of these steps is the seizure not only of the property of enemy States, but of all enemy-owned property coming within their jurisdiction, as pledge for such payment. Again we find the broad method of treatment—all enemy-owned property of whatever kind (there are no exceptions) is subject to compulsory liquidation—the German (or Austrian) Government is to assume the responsibility of compensating the owners, and from the fund thus formed may be paid the claims of Allied and associated subjects, whether these be against enemy subjects, or for injury to their property in enemy countries from Acts of State.

The policy of this step will not be discussed here; it is rather a question for the politician than the lawyer. But it may be observed that the provisions are permissive only, and that criticism founded on their apparent harshness may profitably be deferred till the method of their utilisation is indicated. Though the words are general, their operation may very probably be confined in practice to those enemy-owned trading corporations which are regarded as among the weapons which were directed at this country, while the property of the private individual may be leniently treated or wholly spared.

[1] For a fuller treatment of this and other questions, see the author's *Business Man's Guide to the Peace Treaty* (George Allen & Unwin).

But in their endeavour to secure realisable property the treaty-makers have gone further, and these provisions include not only the property of enemy subjects, but the property of enemy-controlled companies. Here the lawyer is entitled to utter a word of warning as to the difficulties that may arise—difficulties that have frequently been met in civil cases. Time after time the Courts, to meet a case of obvious injustice, have sought to say that a person cannot protect himself by means of the company laws, but finally it has been found to be the only possible policy to maintain that a company is an individual apart from its shareholders.

In the stress of war it was necessary to make apparent departures from this principle—*salus reipublicæ summa lex*—but these were always qualified by the fact that the emergency measures were directed at control rather than at ownership, and that even where property was disposed of the proceeds were vested in custodians to await eventual disposal. Now, however, it is at the property itself that the provisions are aimed, and on their literal interpretation the property of an " enemy-controlled " company here would be liable to confiscation, and while the enemy shareholders would be entitled to compensation from their own Governments, there is no provision for the unfortunate neutrals or allies.

It is easy to fall back on proverbs—" A man is known by his friends "—" When the tares are pulled up the wheat is uprooted also," but these have no real bearing on the case. It is the essence of the legislation in regard to public companies that their shares are freely transferable, and shareholders in the most legitimate British company may find that by means of quiet buying in the Stock Exchange it has become an " enemy-controlled corporation."

Probably here again we may comfort ourselves by the thought that these provisions are merely permissive, and that although the allied or neutral shareholders may be exposed to the losses consequent on a forced liquidation, they will be allowed a share in what remains.

But there are cases which cannot be so met—for example, companies registered in neutral States which cannot be liquidated by our Courts. Probably the answer here is that these do not come within the provisions of the Treaty. A treaty is to be construed generally as a contract between the assenting States regulating the right of those States or their citizens *inter se*, and it would be a

departure from this principle to take such an expression as "German nationals or companies controlled by them" as including, say, a Dutch company which by the law of Holland enjoys the status of a Dutch citizen, even if the majority of the shareholders were German subjects.

All the warring States have exercised freely emergency powers over hostile property. To have refused to recognise such powers, and the transfers of property thereby effected, would have led to intolerable complications, so the emergency legislation of all countries, Allied or enemy, is recognised, but subjects of Allied States who have suffered from enemy emergency measures are entitled to compensation and in some cases to restitution. This compensation is secured on the fund formed by the liquidation of enemy property.

These provisions only apply to damages from acts of State in enemy countries. If the damage is from hostile operations the position of the claimant is far less favourable, since he has no security for the payment of his claims, which will only be discharged in the course of payment of general reparation. He has, however, one rather curious privilege: if he has a claim for such damage he may defer the payment of any debt to a German or Austrian till his claim has been adjudicated on and satisfied.

Patents.—During the earlier portion of the war facilities were afforded for the payment of fees for the upkeep of Patents, Designs, and Trade Marks, and applications could also be filed. Later these facilities were withdrawn, and consequently the greater number of enemy-owned patents have lapsed—at any rate in this country. The treaty permits the revival of these, and the completion of applications. German and Austrian patents so revived in other countries remain liable to the emergency powers as to licences, etc., given in the war.

But the treaty rights of revival extend further. Not only as between enemies, but as between the Allies and Associates themselves permission is given to pay fees and fulfil other formalities omitted during the war, and the periods of priority given under the International Convention are extended so that they may be made after hostilities are over.

This revival of industrial rights would promise a plentiful crop of litigation, so again a clean cut is made. No action may be brought as between enemies for what has been done during the war, and a

period is given for the disposal of infringing articles so made, while among the Allies themselves the revival of patent rights is accompanied by protection for those who have worked during their abeyance.

The difficulties of the authors were undoubtedly great, and not unnaturally they would avoid the introduction of unnecessary definitions, which would have to stand criticism from the legal representatives of each of the High Contracting Parties; but the lack of a definition clause will be much felt. To take one instance, the guarantee for debts referred to above depends on the parties being "resident" in their respective States, but the *time* at which they must have become so *resident* is not stated, and there are at least four different periods to which it may be contended that the term might apply. "Debt," "pecuniary obligation," "company controlled by them" (*i.e.* by German or Austrian subjects), are further terms which need a stricter definition. It is true that the English Courts have considered and defined some of these phrases when used in our statutes, but this in no way answers the question, since the Treaty is an international document not related to the legal system of any one nation.

Appellate Tribunals.—In order to carry out the provisions of the Treaty two tribunals have been created: (1) The Reparation Commission, which deals with the general question of the payment of reparation, and in particular with claims for damages from Acts of War; and (2) The Mixed Arbitral Tribunal. The latter has a very large, but defined, jurisdiction, including all questions between Clearing Offices, or as to damage to the Allied property situated in enemy countries. Appeals by allied subjects against decisions of German or Austrian Courts can also be brought to it, and it has a general jurisdiction in regard to contracts entered into before the war where the parties became enemies, if these questions would come before a German or Austrian Court.

The decisions of this tribunal in matters within its jurisdiction is final and binding, but it has no general power of interpreting the Treaty. This seems somewhat unfortunate, as there are many provisions which are obscure, and it would be most advantageous to have some body which could interpret these once for all, and so ensure uniformity of treatment in the various States.

A few final remarks as to general provisions of these clauses.

All debts, etc., will be settled in the currency of the Allied and Associated States concerned, unless otherwise provided. If the provision is for payment in German or Austrian currency the rate of exchange taken will be that immediately before the outbreak of the war. In nearly all cases claims carry interest at 5 per cent. In calculating time for the purpose of prescription, etc., or for the performance of any formality, the period of the war is excluded.

Very considerable difficulties are introduced by the fact that the enemy States, especially Austria, have been broken up. Many of these difficulties are left to be dealt with in later treaties, but there are some provisions for the partition of property and liabilities due to such change of Government. Generally provisions as to debts, etc., between enemies do not apply in cases where the difference of nationality of the parties is due to changes made during or after the war, nor do they apply when the former enemy subject has *ipso facto* become a subject of a friendly State.

One word of warning should be given as to the application of the Treaty. It regulates the rights of the States *inter se*, and generally does not affect the relations between a State and its own subjects. This is especially important in regard to the sections relating to industrial property.

THE INDUSTRIAL COURTS ACT, 1919.

[*Contributed by* Sir Lynden Macassey, K.C., D.Sc., LL.D.]

The Industrial Courts Act, which came into operation last November, marks an important advance in English industrial legislation; one that invites comparison with the condition of things in Canada, Australia, and New Zealand, where the superficial critic, contrasting merely the formal words of the analogous statutes, would be inclined to claim more substantial progress towards industrial peace. For some years the writer has striven to secure the establishment of an Industrial Court in this country, and in certain material respects has assisted in preparing the way for its successful inception. His views and practical experience may therefore be of interest to that happily increasing number of jurists who are now devoting so much time and attention to industrial affairs, both at home and internationally.

Methods of Settlement of Disputes.—Every Industrial Court is primarily intended to secure the determination of industrial disputes by peaceable methods, and so avoid a decision by methods of force and tyranny. There are three well-recognised stages in the evolution of the adjustment of industrial differences: first, settlement by force, that is to say, by strike or lock-out; secondly, settlement by conciliation; thirdly, settlement by a Court in accordance with definite principles. These three stages correspond exactly with three clearly recognisable states of industrial psychology. Strikes and lock-outs are obviously the expedients of that primitive notion of industry, that the stronger shall prevail, that spoils shall be to the victors; conciliation emerges when masters and men begin to recognise that their respective interests are not antagonistic, but largely common; arbitration, in the sense of a binding determination by a tribunal, appears when it is recognised in a country that industry is a form of national service, and that there are really

three parties involved in every industrial difference—employers, employed, and the public, either that section of it constituting in the case in question the consumer, or the whole of it, that is to say, the community. In Great Britain and Ireland we have arrived at that stage of industrial psychological development which will accept conciliation but not compulsory arbitration; in Australia, New Zealand, and Canada, compulsory arbitration is on the statute book, but no one who knows the real circumstances will say it is in effective operation.

Compulsory Arbitration.—Following, no doubt, the Dominion precedents, the Government's first draft of the Bill for the Industrial Courts Act provided for compulsory arbitration. That proposal, however, did not long survive the storm of trade-union opposition. Indeed, any such proposal is logically unsound as long as the Trade Disputes Act, 1896, remains law. Compulsory arbitration—meaning by that the compulsory reference of industrial disputes to arbitration, and the legal enforcement of the award—is only practicable when it is loyally accepted by the great majority of workmen and trade unions. No dispute can be compulsorily referred to arbitration, and no award can be enforced, against the concerted opposition of either the employers or the unions representing the industry in question. Cases can of course be heard in the absence of recusant parties, but refusal by workmen to obey awards can only be punished by fine or imprisonment, after penal proceedings, of the members of the unions or their leaders, or by prohibiting the payment of strike pay, or by attaching the funds of the labour organisations. Under the Munitions of War Act 1915 we had compulsory arbitration, nominally at any rate, in force in this country during the period of the war. The writer had very considerable experience in attempting to enforce awards; it proved a complete failure—so much so that the Government very wisely abandoned the attempt in 1916. There has been no real attempt to enforce awards even in Australia, where arbitration is compulsory; any attempt to do so has usually been followed by political attacks and campaigns against the officers of Government who endeavoured to apply the law. In Canada, notwithstanding the Lemieux Act, most strikes that occur are contrary to the statute; still they constantly take place. The truth is that labour must have learned to trust employers, Government, and the Industrial Court, before they

agree, and they cannot be compelled to entrust the decision on questions of great trade moment to the arbitrament of an impartial tribunal. The way to that ideal, which is the true condition of industrial peace, lies through tried and trusted conciliation machinery.

Courts of Inquiry.—The Industrial Courts Act provides, following the New Zealand practice, for Courts of inquiry, distinct from the Industrial Court, to investigate the circumstances and character of industrial disputes. In all such matters public opinion is the final sanction ; but public opinion must know the facts before it can form a judgment. The intention is that these Courts of inquiry will examine into the origin of the controversy in all important cases, and state publicly the issues which are at stake. That will avoid the undignified spectacle of Government inserting advertisements in newspapers and publishing posters to give their version of the controversy, and trade unions adopting a similar course. In such cases what can the public do, except to disbelieve both sides ?

The Status of the Court.—The Industrial Court has not been constituted in this country a court of record, as in Australia. It has been appointed by the Minister of Labour. I venture to describe this as a profound mistake, exhibiting on the part of the Cabinet but scant acquaintance with industrial psychology. That the Minister of Labour was averse to such position of sponsorship is an open secret. In the writer's view the Court ought to have been a division of the High Court, somewhat analogous to the Railway and Canal Commission Court. Labour is keenly suspicious of the Government or a Department of Government exercising directly or indirectly influence upon the Industrial Court, or interfering, or being in a position to interfere with its decisions. If there is one institution in the country which enjoys the confidence of labour, it is the High Court of Justice. This is not by way of criticism of the persons who have been appointed by the Minister of Labour to be members of the Industrial Court. Each and all are individuals well known to labour, and in whose experience, independence, and impartiality labour reposes unqualified trust. Sir William MacKenzie, K.B.E., K.C., the President of the Court, has had immense experience during the war of all kinds of industrial controversy ; it is invidious to make comparisons, but no President of any Colonial Industrial Court can show a wider or richer experience.

The South Australian Court.—The vital problem is to work the new Industrial Court so intimately into the texture of our industrial life that its decisions will be universally accepted as fundamental principles on which every industry can build, so that the Court will invariably be invoked by Government, employers, and trade unions as the final tribunal of appeal. The first essential is that the Court should deliver considered judgments explanatory of the principles on which it has proceeded in each individual case. Merely to award that "the claim has not been established," or an increase of wage equal to half the amount claimed, is perfectly futile. It is of course an easy and irresponsible way of disposing of the case; it was inevitably adopted during the war by arbitration tribunals; there was no time for any other procedure. But it is to be hoped we may see no such practice adopted by our new Industrial Court; we feel confident that the distinguished jurist who presides is sufficient guarantee against such slovenly inefficiency. On this point the practice of the South Australian Industrial Court affords a clear line of guidance. That Court is presided over by the Hon. W. Jethro Brown, better known perhaps in this country as the gifted author of *The Underlying Principles of Modern Legislation*, an admirable analysis of comparative legislative ideals, purposes, and action. The judgments of the Court are published periodically, the last is before me as I write; they are most able expositions of the industrial principles to be applied to circumstances such as those of the particular case before the Court. Already in South Australia they have had a most potent effect in moulding industrial opinion. It cannot be too strongly impressed upon our new Industrial Court that it ought to follow the example of the South Australian Court. Ninety per centum of the industrial disputes which occur, do occur simply and solely because neither side knows what principle should be applied. Where there are no principles, *tot homines, quot sententiae* —and strikes.

The Assistance of Counsel.—In one other respect it is to be hoped our Industrial Court will profit from experience in the Dominions; that is in regard to the admission of counsel to argue cases when either party desires their assistance. Speaking from a long experience of sitting as an industrial arbitrator, and of presiding at Industrial Courts of arbitration, I have invariably found,

in the few instances where counsel were present, that their handling of the case was helpful. The type of counsel required is one who takes a broad view, gets at essentials from amid the usual mass of intriguing, immaterial details, and who conducts his case in a tactful and considerate manner. But I will be quite candid and admit that I have had to adjourn arbitrations provoked into complete disorder by the well-intentioned but ill-directed efforts of a member of my own profession who forgot that at such an arbitration, while all things may be lawful, all things may not be expedient. The President of the new Court can tell quite well from his ripe experience within what limits a wise and tactful counsel can be allowed to conduct his case so as to be of assistance to the Court. This one thing, however, is quite certain: unless cases are thoroughly threshed out, and the principles to be applied criticised and examined from every point of view, the Court will not be able to build up by decisions a code of industrial law. There is this further consideration, many employers will not agree to resort to the Court unless they are permitted to present their case by counsel. The trade unions have specially trained officials to argue their case, and the latter do it, as I have almost always found, with ability, force, and great conviction. With but few exceptions, employers' organisations have no such special officials on their staff.

The new Industrial Court will be watched with interest. The experience of the Dominions has shown the pitfalls to be avoided, and at the same time the direction in which progress lies. On Sir William MacKenzie a heavy responsibility has devolved, one that he may be trusted effectively to discharge; but until his Court is made a division of the High Court, he is seriously handicapped in his great national work.

UNIFICATION OF COMMERCIAL LAW.

[*Contributed by* Sir Courtenay Ilbert, G.C.B.]

Chambers of Commerce have often advocated the unification of Commercial Law throughout the British Empire. But they are apt to underrate the difficulties of enacting in Parliament laws which are intended to operate outside the United Kingdom, especially within the self-governing dominions. Parliament does not, as a rule, legislate for matters within the powers of a local legislature. Parliament would not attempt to pass a law operating within any of the self-governing dominions except with the clear approval of the dominion concerned. In the case of a law intended to operate generally throughout the Empire, or throughout any important parts of the Empire, there would be the preliminary difficulty of obtaining approval of the draft. This would mean protracted negotiation. Then there would be the difficulty of persuading Parliament to abstain from amending a law submitted for enactment. This difficulty nearly wrecked the Commonwealth of Australia Act.

The Merchant Shipping Act of 1894 occupies an exceptional position. It regulates matters relating to ships, which are, for most purposes, regarded as floating portions of English territories. And even so far as it operates within the territorial limits of local legislatures, it is liable to extensive modification, and is extensively modified, by those legislatures.

The Copyright Act of 1911 was originally intended to be an Imperial Act, and efforts were made, during a long series of years, to give it Imperial operation. But these efforts failed, and the Act could not have been passed without the provisions embodied in ss. 25–27.

The difficulties referred to above would, it is to be feared, be fatal to any attempt to pass at Westminster chapters of an Imperial Commercial Code.

Experience shows that whenever Parliament passes a good law, carefully framed, like the Bills of Exchange Act, or the Sale of Goods Act, legislatures in other parts of the British Dominions readily copy or adopt it. This would presumably be the best mode of obtaining such kind and amount of uniformity in commercial legislation throughout the Empire as is, in existing circumstances, feasible and desirable.

In some cases, where treaties are concerned, or reciprocal action is needed, special forms of legislation are required.

The subjoined note by Mr. C. C. Gerahty illustrates the readiness with which a well-drawn Act is adopted and adapted in other parts of the British Dominions and in the United States.

The Sale of Goods Act.—The Sale of Goods Act, 1893, is generally admitted to be a successful and correct codification of this branch of English mercantile law.

It embodies the principle that the question whether a contract for the sale of goods does or does not pass the general property in the goods contracted to be sold, must in all cases be determined by the intention of the parties to the contract. The Act codifies the rules by which that intention is to be ascertained, but the inferences based on the rules may always be displaced by the terms of the contract itself or the surrounding circumstances, including the conduct of the parties. No doubt the municipal law with reference to which the parties enter into the particular transaction is material in considering their intention as to the passing of the property; and if it appears that they contracted with reference to a municipal law other than English, and it be further proved that the municipal law is different in any material respect from the English law, this will of course be taken into account in determining their intention. But having regard to the presumption that unless the contrary be proved, the general law of a foreign country is the same as the English law, the mere fact that the contract was entered into with reference to the law of another country will be immaterial. Having regard to the history of English mercantile law, the presumption referred to is itself quite reasonable. An investigation of the commercial codes of foreign countries would probably show that they differ from English commercial law rather in detail, or in the inference to be drawn from particular facts, than in substance or principle.[1]

An examination of the commercial laws of the British Empire shows how widely a well drafted Act of Parliament may be adopted throughout the Dominions and Crown Colonies.

The following British possessions have adopted the Act with only slight verbal alterations:

Canada.—(1) Alberta, C.O.N.W.T. 1898, c. 39. There is no provision as to market overt. (2) British Columbia, R.S.B.C. 1911, c. 203. The doctrine of market overt applies. (3) Manitoba, R.S.M. 1913, c. 174. No provision as to market overt. (4) New Brunswick, 1919, c. 4. (5) Nova Scotia, 1910, c. 1. Applies only to contracts for $40 or upwards. No provision as to market overt. (6) Prince Edward Island, 1919, c. 11. (7) Saskatchewan, R.S.S. 1909, c. 147. (8) Yukon Territory, C.O. 1914, c. 78.

Newfoundland, 1899, 62 Vict. c. 2.

[1] See the judgment of Lord Parker in *The Parchim*, [1918], A.C. at p. 161.

Australia.—(1) Queensland, 1896, 60 Vict. No. 6. (2) South Australia, 1895, No. 630. (3) Tasmania, 1896, 60 Vict. No. 14. (4) Victoria. The Goods Act, 1915. Part I. is identical with the Imperial Act, but the Victoria Act is more extensive and provides for the law relating to Consignees, Mercantile Agents, Documents of Title to Goods, Bills of Lading (Part II.), Effect of Execution and Conviction in Title to Goods (Part III.), Trading Stamps or Coupons (Part IV.), Merchandise Marks (Part V.). (5) Western Australia, 1895, 59 Vict. No. 41. New Zealand, 1908, No. 168.

British Guiana, Ord. No. 26, 1913. Substituting English law for the Roman Dutch law on the subject.

British Honduras, 1899, No. 14.

Gibraltar, 1895, No. 20. (*Cons. Laws*, 1913, p. 241.)

Isle of Man.—Sale of Goods Act, 1895.

British West Indies.—(1) Trinidad and Tobago, No. 64. No provision as to market overt. (2) Jamaica, No. 12 of 1895. (3) Bahamas, 1904, c. 37. (4) Barbados, No. 91, 1895. The provisions of ss. 4 and 17 of the English Act are omitted, and there is no provision as to sale in market overt.

The principal of the British possessions which have not adopted the Act is South Africa, where the Roman Dutch law is the basis, but the influence of English law has made itself felt. Where the principles of law are the same in both systems, English law is taken over *en bloc*. Where the principles or rules of law of the two systems are different, English law is nevertheless allowed, so far as possible, to supply matter of detail.

In Canada, Ontario has not adopted the Act, but the Commissioners on uniformity of legislation in Canada have recommended that it should do so. In Quebec French law prevails, so that subject is dealt with in the Civil Code and amending Acts.

In Mauritius and Seychelles the subject is dealt with in the Civil Code.

In the Windward Islands the law relating to Sale of Goods is identical in all material points with the provisions of the Quebec Civil Code.

In Australia, New South Wales appears to be the only State which has no Act resembling the Imperial Act.

In India, by ss. 76–123 of the Indian Contract Act, 1872, the Indian law resembles, but does not exactly reproduce, the English law on the subject.

In British East Africa the Indian Contract Act, ss. 76–123, has been applied.

Besides being widely adopted in the Empire the Sale of Goods Act was also followed in the United States in the Uniform Sales Act, 1906, which has been adopted in nineteen out of fifty-three American states or jurisdictions. The following list shows the various states in which this Act has been enacted, with the dates of their enactment: Alaska,

1913; Arizona, 1913; Connecticut, 1907; Illinois, 1915; Maryland, 1910; Massachusetts, 1908; Michigan, 1913; Minnesota, 1917; Mississippi, 1908; Nevada, 1915; New Jersey, 1907; New York, 1911; North Dakota, 1917; Ohio, 1908; Pennsylvania, 1915; Rhode Island, 1908; Utah, 1917; Wisconsin, 1911; Wyoming, 1917.

WAR FINANCE AND THE BASIS OF POSTAL RATES.

[*Contributed by* A. D. Smith, Esq., D.Sc., F.S.S.]

Prior to the introduction in England in 1839 of Sir Rowland Hill's scheme for the reform of the posts on the principle of uniformity of rate irrespective of distance, postage had been almost universally regulated according to the distance of transmission, a method for which, *prima facie*, there was a good deal to be said. The principle of uniformity of rate was, of course, fundamental, and its introduction effected a complete revolution in the financial basis of the postal system. Its merits were, however, so quickly recognised that the example of England was followed within a few years by the principal countries of the world.

The Cost of Transmission.—In his plan of reform Sir Rowland Hill was able to show that the total cost of the transmission of a letter did not vary proportionately with the distance of transmission, largely on account of the fact that the chief expenses in connection with a letter are incurred at the places of posting and delivery, and only a very small proportion in actual conveyance from town to town. It was further shown that the cost varied inversely with the number of letters enclosed in a mail, and was sometimes actually less in the case of letters sent over hundreds of miles than in the case of letters sent for less than fifty miles. For example, by a careful analysis of the financial accounts of the Post Office, and the mass of other information contained in the voluminous Reports issued in the 'thirties of the last century by the Commissioners of Post Office Inquiry, Sir Rowland Hill was able to demonstrate that the cost of conveying a single letter by mail coach from London to Edinburgh was no more than a thirty-sixth part of a penny, while the actual cost of conveying a letter from Lincoln to Louth was considerably more, owing to the small number of letters contained in the mail. This contrast, which is sufficient to demonstrate the soundness of the uniform rate, arises from the fact that the ordinary letter is light and small, and large numbers can be forwarded in a small mail-bag. The principle is not necessarily applicable to larger packets, *e.g.*, newspapers, books or parcels, and although uniformity of rate has been adopted in the United Kingdom for the Parcel Post, it has not been generally adopted in other countries. The larger countries, Canada, the United States, and Germany have preferred a zone system of charges for parcel post.

The Collection of the Postage.—Under the old system the postage was collected on delivery of the letter, and this method involved the maintenance of a system for recording all letters sent forward to a postmaster to deliver, in order to ascertain the amount of postage due to be collected by the postmaster and accounted for by him. This system necessarily gave rise to a large amount of clerical work, and the collection of the postage on delivery of the letters occupied much time and impeded delivery. The elimination of the expense and delay caused by this method of collection was part of Sir Rowland Hill's scheme. His proposal was to reduce the average rate paid on each inland letter to the uniform rate of one penny, and, as the average rate prior to the reform was, roughly speaking, 8*d*., it followed that, even presuming there would be no increase in working expenses, which was inconceivable if the same practical methods were followed, an immediate eightfold increase in the number of letters would be necessary if the revenue was to be maintained.

Reduction of Working Expenses.—At that time, on account of the high rates charged, there was a large illegal traffic in letters outside the post, and Sir Rowland Hill calculated that, with a uniform rate so low as a penny, all these letters would be attracted to the post, and there would also be a very large increase in the number of letters written. Even so, however, he estimated that only a fourfold increase in numbers could be anticipated immediately, and as it was a fundamental merit of his plan that the existing net revenue would be maintained, he expected to achieve that result by a diminution of working expenses. This saving of expense was to be secured by instituting compulsory prepayment of postage. Envelopes bearing an impressed stamp, similar to the impressed stamp at that time required by law to appear on all newspapers, were to be sold at post offices, and letters for the post were to be enclosed in these envelopes. All charges having been thus paid before the posting of the letter, it would be unnecessary to make any record, and all such clerical work could be dispensed with. Should a person bringing a letter to post be unable to write the address on the envelope, Sir Rowland Hill suggested that the "difficulty might be obviated by using a bit of paper just large enough to bear the stamp, and covered at the back with a glutinous wash, which the bringer might, by applying a little moisture, attach to the back of the letter, so as to avoid the necessity for re-directing it." This method, designed to meet an exceptional case, became the normal method of prepayment of postage, and is now perhaps the chief characteristic of the modern postage system.

Introduction of Reform.—In the United Kingdom the general policy which had governed the rates of charge was entirely changed at the introduction of the reform. Postage had always been regarded as a duty—the "duty of postage"—comparable with the duty on post-horses, or on paper, or any other ordinary revenue duty; and the rates

of postage had been varied with the varying financial needs of the Government. Thus, in 1765, 1784, 1797, 1805 and 1812 the rates were increased for the express purpose of raising revenue, and the increases were so far successful that the net revenue rose from some £466,000 in 1796 to some £750,000 in 1813. The increases made in 1812, however, produced only a small result, and the postal revenue remained stationary after their introduction, although the wealth and commerce of the nation were increasing rapidly.

United States and Canada.—In the United States and Canada the posts were, in the early nineteenth century, a source of expense rather than revenue, and postage was not regarded as a source of general revenue, even before the introduction of the reform. In the United Kingdom the high rates, laid on avowedly for revenue purposes, were at last seen to a large extent to defeat their own purpose by restricting correspondence and driving persons to adopt illicit methods of transmission. And, apart altogether from questions of finance, one of the strongest arguments advanced by Sir Rowland Hill in an era of reform, when the world was looking for moral and intellectual regeneration, was that the reduction of postage would effectively aid "the moral and intellectual progress of the people," and the Post Office would assume "the new and important character of a powerful engine of civilisation." Postage was thus removed from the category of ordinary fiscal charges, and for over seventy years, the changes in the rates, in the United Kingdom, as well as in Canada and the United States, were made with a view to the financial requirements of the Post Office as a self-supporting institution, and not with the view of securing increased revenue for the general purposes of the State.[1]

Revenue for War Purposes.—The necessities arising from the war have, however, led to a revision of this policy. In most of the countries directly affected by the war postal charges have been increased with a view to obtaining increased revenue, and, to some extent, reducing the volume of postal traffic so as to release a greater number of men for military duties or other work directly connected with the prosecution of the war. The United Kingdom was the last of the great countries to abandon the penny rate for letters, and the increase, when it was finally adopted in 1918, was justified by the authorities on a variety of grounds. In 1915, when several minor increases had been made with the view of raising additional revenue and reducing the volume of traffic, the penny rate for ordinary letters had been continued, the maximum weight transmissible for a penny being merely reduced from 4 oz. to 1 oz., and the rates on heavier letters increased. As more than 86 per cent. of the

[1] This sketch of the pre-war basis of postal rates is necessarily very brief. The subject is dealt with in detail in the writer's *Development of Rates of Postage: an Historical and Analytical Study* (George Allen & Unwin, Ltd., London, 16s.).

total number of packets passing at the letter rate, are less than 1 oz. in weight, the change affected only the small remaining proportion, and the results, from a financial point of view, were correspondingly small. The increase of 1915, including the increase of 1*d.* on every parcel, yielded an increased revenue of less than a million, and, in view of the heavy increases in the wages of staff and the cost of materials, the net revenue of the Post Office had fallen from £6,642,067 in 1913–14 to some 2½ millions.

Increase of Letter Rate.—If any material increase of Post Office revenue was to be obtained, it was clear that it would be necessary to increase the penny rate on ordinary letters, and the experience of other countries had shown that such an increase might be expected to yield good results financially. The Budget of 1918 accordingly provided for an increase of the rate on ordinary letters to 1½*d.*, and for modifications of the rates on heavier letters. In effect, the new scale was identical with the pre-war scale for letters with the addition of a war tax of ½*d.* throughout the scale. In proposing the increase to Parliament, the Chancellor of the Exchequer justified the change on the ground that already nearly all the great countries of the world had adopted a similar increase, and the present need of the Government was very different from the need when the proposal was rejected in 1915. The Government made clear, however, that they were not proposing the increase as a war increase pure and simple, which would be withdrawn automatically as soon as peace was signed. The financial position of the Post Office has been adversely affected by the general rise of prices during the war. Large increases in the cost of engineering materials have resulted, and there have been similar increases in the cost of conveyance of mails, especially road conveyance. There is the further cost of the war bonuses to the staff, amounting in all to some six millions a year, although it may be problematical how far these bonuses will be a permanent charge. The expenditure of the Post Office, calculated on a commercial basis, was estimated for the year 1918–19 to amount to, approximately, £42,500,000, and the revenue on the then existing rates (May 1918) to, approximately, £45,000,000. As the surplus before the war amounted to over 6½ millions, it appeared likely that, unless a substantial increase in revenue were obtained, the profit would soon reach vanishing point, and, in the view of the postal authorities, it was therefore necessary on that ground to increase the charges made for the services rendered to the public.

In addition to the increase on inland letters, increases of rates were also proposed for letters sent to the troops abroad, and letters for the British Empire and the United States, for inland postcards and inland parcels. The Postal Union Convention of 1906, to which the United Kingdom was a party, prevented the increase of other foreign rates, the increase in the case of letters for the British Empire and the United States

being possible from the fact that the existing penny rate was lower than the authorised international rate of the Universal Postal Union.[1] The rate on inland postcards was at the same time increased to 1*d.*, partly to avoid serious leakage of revenue from the extended use of postcards in place of letters.

Parcel Rate.—The inland parcel rate had been increased in 1915 by a uniform 1*d.* on every parcel, and this increase had not been found to cause any diminution of traffic. The petrol and other restrictions, limiting the capacity of the carrying agencies, diverted a large number of parcels to the post office, and the number posted was still greater than the number handled prior to the war. A further increase in parcel rates was now made, the minimum charge being raised to 6*d.*, and the scale of charges simplified by introducing three charges only, 6*d.*, 9*d.*, and 1*s.*

These changes were estimated to produce an increase of gross revenue of some four and a half millions, distributed as follows: inland letters £2,700,000, letters for the troops £550,000, letters for British Empire and United States £140,000, inland postcards £750,000, inland parcels £500,000; Total £4,640,000.

The proposal to increase the rate on soldiers' letters was abandoned in Parliament, leaving an estimated increase of four millions. So far as can be judged from general observation, there has been no diminution in the number of letters. There has, however, been an appreciable falling off in the number of parcels posted owing, no doubt, partly to the transfer of light parcels to the Letter Post. Owing to shortage of staff, and other practical difficulties, the Post Office has not, since the introduction of the new rates, taken statistics of the numbers of postal packets actually posted, but from the returns of gross revenue it is estimated that the increased revenue of £4,000,000 will be reached, and even perhaps exceeded.

Of the increased yield of revenue obtained from the new rates, by far the greater part, some 75 per cent. in fact, is derived from inland letters, and of this probably 85 per cent. is derived from the ordinary light letter, under 1 oz. in weight, which formerly passed at a penny. The financial questions involved in the increases may therefore be said to turn on the fate of what was formerly the penny letter. On the question how far the increase will be permanent the Post Office has shown itself extremely cautious. In Parliament, the Postmaster-General and the Assistant Postmaster-General have dwelt on the narrow margin of profit shown on Post Office working under the old rates as indicating that, after the war, the position of postal finance would be precarious if the old rates

[1] The International Bureau has, however, now proposed that the international letter rate be increased to 40 centimes, and the international postcard rate to 25 centimes.

were re-established; and the Secretary to the Post Office has refrained from holding out any prospect that the reduction might be looked for in the near future.

Increase in the United States.—In the United States the Post Office has never until quite recent years yielded a net revenue to the State, and it has never, therefore, been looked upon as a branch of national revenue. In the last few years, however, the revenue of the Post Office has shown a considerable surplus, amounting in 1917, according to the official returns, to $9,836,211·90. When adjusted so as to show the revenue and expenditure on a commercial basis, the surplus was increased to $12,249,487·16. Nevertheless, in common with other countries, the United States has been led by the necessities of war to increase postal charges. By an Act of October 3, 1917, the rate on letters was increased from 2 cents to 3 cents an ounce, and on postcards from 1 cent to 2 cents each. At the same time a special rate of 2 cents was introduced for drop letters, *i.e.*, letters posted and delivered in the same city.

Second Class Mail Matter.—An important change was also made in the rate for second class mail. For many years the United States Post Office has been dissatisfied with the position in regard to second class mail matter. The very low rate of charge, 1 cent a pound, has resulted in an enormous increase in the quantity of such matter sent by post, and, as the rate charged is far from remunerative, the loss to the postal revenue is very considerable. It has been estimated at 8 cents a pound. The Department has accordingly for a long period endeavoured, but without success, to obtain some increase of the rate on second class mail, so as to put the charges on a more satisfactory basis, and has therefore availed itself of the opportunity presented by the proposals for a general increase of postage to meet war needs to take the first step towards remedying this long-standing evil. The rate on that part of the magazines and other periodicals entered for transmission as second class mail which is devoted to literature, has been left unaltered; but an increased charge, graduated according to zones of distance, has been imposed on that part which consists of advertising matter. This increase of rate has been made with the definite view of reducing the loss incurred in the handling of second class mail, and is intended to be permanent.

United States Letter Rate.—The United States Post Office, however, holds to the view that the postal service should not be used as a means of raising general revenue, but that its charges should be fixed solely in the view of covering the cost of the service. In consonance with this view the language of the Act clearly indicates that the increased rates imposed on first class mail, and on parcels, have been imposed only as a war measure, and will be of temporary duration only. So far from contemplating a permanent increase of the letter rate, the Department regards the increase on second class mail as the first effective step toward

a reduction of letter postage below the pre-war rate. General one-cent letter postage has long been the aim of the United States Post Office, as frequently expressed in past years, and the Department now states that the increase in second class mail will enable it, immediately after the settlement of peace, to recommend the introduction of a rate of 1 cent an ounce for drop letters, to be followed by the introduction of general inland one cent letter postage, as soon as the rates on second class mail have been further increased, so as to approximate to the cost of handling and conveyance.

Post-war Reduction in the United States.—There is no doubt that, so far as letter postage itself is concerned, a penny (2 cent) rate would prove remunerative, and there is equally no doubt that if the finance of the Letter Post could be considered without reference either to other branches of the postal service, or financial considerations outside the postal service, this reform is now within reach. The Senate and House Conference agreed early in 1919 to restore the pre-war postage rates on first class matter (*i.e.* letters and postcards) on July 1, from which date the familiar 2 cent letter rate and 1 cent postcard rate have again been in operation. The financial strain was, no doubt, less severe in the United States than in the European countries engaged in the war, but this early restoration of Sir Rowland Hill's penny rate will not be without its influence upon those other great countries which have been driven by the necessities of war to abandon an institution so popular, and so intimately bound up with daily life, as the Penny Post.

INTERNATIONAL LEGISLATION.

[*Contributed by* F. N. Keen, Esq.]

The war has evoked an extensive literature dealing with international organisation and a League of Nations. This literature has failed, for the most part, to assign a sufficiently important place to international legislation as a means of securing and maintaining orderly relations between the States of the world. Nor does the League of Nations Covenant in the Paris Peace Treaty expressly recognise legislation as one of the functions of the permanent organisation it proposes to set up.

The circumstances which attended the outbreak of the war have suggested the lines upon which most of the schemes for a League of Nations have been framed. Peace-loving people were shocked at the suddenness with which an unparalleled military aggression swept aside all efforts of well-intentioned statesmen to apply conciliatory processes or to secure a dispassionate and judicial examination of the circumstances involved in the Austro-Serbian dispute. A strong sentiment was thus immedi-

ately stimulated in many countries in favour of the establishment of some permanent arrangements which would prevent the repetition of such a calamity. This sentiment found its outlet in schemes designed to put the common will and force of nations behind an international covenant which should restrain sudden aggression and compel impartial inquiry and either a judicial decision or a conciliatory recommendation before a dispute should be made the occasion for war.

As the proposals for a League of Nations have developed, it has been increasingly recognised that the world needs an institution, not merely for settling dangerous disputes and suppressing imminent war, but also for discouraging the growth of friction between nations, and promoting the permanent maintenance of friendly and harmonious international relations. Thus the earlier schemes have been amplified by the addition of proposals as to such matters as the limitation of national armaments, the publication of treaties, and the provision of machinery for co-operative action between nations upon certain important subjects which are fruitful causes of friction.

The schemes have, however, for the most part stopped short of recognising that legislation is the most essential form of co-operation, and that, in the common definition and acceptance of fixed rules for regulating and adjusting the relations between nations, the world is likely ultimately to find its greatest preventive of war.

Four books dealing with international reorganisation which have been sent for notice accord prominence to the development of international law.

The first is by Mr. T. W. Balch, of the Philadelphia Bar, and is entitled *A World Court in the Light of the United States Supreme Court*.[1] It gives an interesting account of how boundary disputes between the English-speaking North American colonies were settled originally by the Privy Council or special Commissions, and ultimately, after the establishment of the Federal Constitution, by the Supreme Court of the United States. It shows that, when a dispute of this kind arose which involved an economic difference of fundamental importance (namely, a difference on the slavery question) over which the States were divided into two fairly equal bodies, the decision of the judicial body was not respected, and civil war supervened.

While looking forward to the constitution of international tribunals, gradually evolving into a Supreme Court of the world, which would successfully deal with international disputes of a legal character, the author argues, from this experience of the United States of America, that a Supreme Court of the world could not be expected by its judgments to compass in peace political quarrels dividing the Powers of the world into two fairly equal groups, and that the best hope for the elimina-

[1] Published by Allen Lane and Scott, Philadelphia, 1918.

tion of war lies in the gradual transfer of disputes from the domain of political to that of legal questions through the legislative efforts of future Hague Peace Conferences.

The second book is by Dr. Hans Wehberg, and is entitled *The Problem of an International Court of Justice.*[1] It contains an able examination of the project for establishment of a World Court of Justice, and discusses the essentials of the constitution and procedure of such a Court. It strongly advocates the establishment of a permanent Court, consisting of professional judges, holding an independent and secure position and removed as far as possible from national bias. The chief ground upon which the proposal is recommended is that it would lead to a continuity of decision and adherence to legal principles, which is not attainable by disconnected arbitration, and it would thus promote the growth of a consistent body of international law. While thus advocating the development of international law through judicial decision, the author recognises the need for direct legislative procedure by means of international conventions.

One of the chief merits of the book lies in its appreciation of the importance of the fact that the development of international law will give a definite standard or basis upon which States can themselves regulate their conduct and settle their own differences, as well as providing a principle for the guidance of a judicial authority in imposing terms of settlement upon disputant nations.

The third book is called *A New Principle of International Law*, by A. M. M. Montjin, LL.D., Barrister of The Hague.[2] It gives a brief summary of some of the principal projects of the past for prevention of war, and proceeds to point out that schemes for the creation of tribunals of one sort or another, and for the application of force to compel resort to such tribunals, must prove fruitless, so long as the international legislative regulations, which an international tribunal would have to apply, are lacking. "In order to settle disputes between States," it says, "it is not sufficient to appoint an international judge, but the first necessity is positive international law."

Starting on these broad lines, the book subsequently narrows down to an argument for the application of a particular principle to the adjustment of international relationships. The author holds the great source of difficulties and resulting war between States to be the absence of a due proportion between the density of population and the extent of territory of different States; and he contends that at the end of every fifty years State boundaries should be revised, and annexations of territory should be made. He suggests also that these systematic annexa-

[1] Published by the Clarendon Press, Oxford, 1918.
[2] Published by Belinfante Brothers, Ltd., The Hague, 1919.

tions of territory should be accompanied by emigration, not annexation, of population, the design of this latter proposal being to avoid subjection of people to foreign and uncongenial dominion. It is proposed that the science of anthropo-geography should be requisitioned to assist in this adjustment of international relationships; but how it is to be used, and how exactly the changes of territory and population are to be brought about, is not at all clearly explained.

The most striking of the four books is a translation of a work by Professor Walther Shücking, one of the German delegates at the Paris Peace Conference, and is called *The International Union of the Hague Conferences*.[1] It presents the view that the Hague Conference, with its provision for periodic meetings, its International Bureau, Administrative Council, Permanent Court of Arbitration, and design for a Judicial Arbitration Court and International Prize Court, has actually brought about a legal and political organisation of the world of the nature of a loose confederation, although it has not given this confederation a name. The author sees, in the recognition and the further development of this organised union of the world, the hope of substituting international law in place of international anarchy, and thus doing away with war by attacking its origins. He looks forward to the scientific regulation of international conduct by a systematised legal code created partly through judicial decisions and partly through substantive legislation under new Hague Conventions, and as a means of attaining this end he contemplates a gradual extension of the voluntary acceptance by States of the principle of majority decision upon specified matters. He looks upon the requirement of unanimity for international action as a fetish which belongs to a past age, and ought to be removed. He advocates the addition to the institutions of the Hague of a World Parliament which would consist of representatives of the Parliaments of the member States meeting side by side with the Hague Conference, strengthening its action and exercising a right of legislative initiative.

Recognising thus that "we already live in a world federation," and that "the beginning has been made of a political organisation of the civilised world," he contends that "the further development of the world federation will . . . not be long delayed, and it will come about much sooner than persons are inclined to believe at the present day."

His faith in the efficacy of law as the great instrument of peace preservation is well shown in a sentence in which he says that "war will cease to be a legal institution as soon as the States constituting the World Federation shall have bowed to the rule of law in their foreign relations, as they have done in their domestic affairs by the establishment of constitutions."

One turns from the perusal of these four books with the conviction

[1] Clarendon Press, Oxford, 1918.

that international law is destined hereafter to take a very different place in the world from that which it has hitherto occupied. To a world sick of war, sick of anarchy, sick of dominating selfishness and autocratic power, the rule of law presents the one effective means of procuring unity and peace, and the secure enjoyment of a reasonable measure of national freedom. In the days that are coming, no art will contribute more to human happiness than the art of the legislator, who can frame wise, just, and acceptable laws for the regulation of international conduct and relations.

THE PROTECTION OF WILD BIRDS.

[*Contributed by* A HOLTE MACPHERSON, ESQ.]

IN 1913 a Committee was appointed to inquire what action has been taken under the Wild Birds Protection Acts for the protection of wild birds, and to consider whether any amendment of the law or improvements in its administration are required. The evidence of the last witness was taken only a week before the outbreak of war, which accounts for the Report having been delayed until July 1919.

In addition to hearing thirty-six witnesses, the Committee obtained through the Foreign Office the text of various foreign laws on the subject of their inquiry. The Report shows that these foreign laws have been carefully considered, and they are frequently quoted as precedents for the recommendations made.

Our law for protecting wild birds is extremely complicated and difficult to interpret and enforce. It is contained in several Acts and innumerable local orders. The Report recommends many drastic alterations, both in the law and in its administration.

Scheme for Protection of Birds.—The schemes for protecting birds suggested to the Committee fell, roughly speaking, into two classes: one for protecting certain named species, leaving the remainder unprotected; the other for protecting all birds except certain common and harmful species named in a schedule (para. 53). The former method is, to a great extent, that of our existing law, under which, although general protection is given during the close season, only certain scheduled birds are protected against owners and occupiers; and any birds receiving protection all the year round, must be named in a Secretary of State's Order, made on the application of a local authority. In Ireland, these orders are made by the Lord-Lieutenant.

The plan of naming the protected species is followed in the Swiss *Loi Fédérale sur la chasse et la protection des oiseaux* of 1904. In Hungary, also, where the protection of birds has received much consideration from

the agricultural point of view, the same principle was adopted in the Decree of the Hungarian Ministry of Agriculture of 1901.

On the other hand, in this matter simplicity is perhaps the chief requirement, and it would appear far simpler to protect all birds, except a few named in a "black list." This is the principle of the Dutch Law of 1912, of the United States Federal Law of 1913, and of the German Imperial Law of 1908, all of which are set out in an Appendix to the Minutes of Evidence. The same principle appeared also in the previous German Imperial Law of 1888.

The Commissioners, however, reluctantly reject the "black list" method. They would give protection to all birds during the breeding season, subject to the right of an owner or occupier of land to take on such land any bird, except birds mentioned in two schedules, injurious to his interests. The schedules contain respectively a list of birds absolutely protected during the breeding season, and a list of birds absolutely protected all the year round. It is suggested that power be given to a central authority, on application of the local authority, to vary the close time, to vary the schedules, to exempt certain destructive birds from all protection, or to protect all birds with specified exceptions in a local area (paras. 59 and 60). The method advocated follows no foreign precedent, but is in fact a modification of the existing system.

Protection of Eggs and Nests.—The eggs of wild birds received no protection in this country prior to the Act of 1894, and there is no mention whatever of nests in our existing law. Considering that many collectors are in the habit of taking nests, together with their complete clutches of eggs, this omission to deal with nests is strange. Protection is extended to them by the Norwegian Shooting and Trapping Law of 1899, the German Imperial Law of 1908, the Dutch Law of 1912, the Spanish Law of 1902, and the Hungarian Decree of 1901. In the Isle of Man, too, nests are protected by an Act of the Manx Parliament of 1887. Both under the terms of the Paris Convention of 1902 for the protection of birds useful to agriculture, and also under the proposed United States Model Law of 1886, which has been adopted by many of the state legislatures, protection is given to the eggs and nests of all protected birds. The Report suggests that the same line should in future be followed in this country (paras. 66 and 68).

Advisory Committee.—One of the chief recommendations in the Report is that an Ornithological Advisory Committee be established to obtain information as to birds, to investigate their food and habits, and to advise the central authority (paras. 96 to 99). Under the present system a large number of very confusing and unsatisfactory local orders have been made by the Secretary of State, or in Ireland by the Lord-Lieutenant, on applications of councils of counties and county boroughs. These orders deal with many matters, such as extending or varying the

statutory close time, adding birds to the county schedule or giving protection to all or to specified eggs within a county area. The Commissioners report, although the statement seems hardly credible, that, except in Scotland and in cases where agriculture and fisheries are affected, these local orders have hitherto been made without any expert advice. In advocating the establishment of an Advisory Committee the Commissioners are following the lead of the United States, where the Division of Biological Survey advises the Department of Agriculture, and of Hungary, where a Central Office of Ornithology was established as an advisory body in 1894.

Licences for Collectors for Scientific Purposes.—A defect in our existing law is that it makes no provision for the person who desires to obtain specimens for scientific purposes, and the Report now recommends the granting of licences to collect protected specimens to approved persons above the age of eighteen. These licences are to be granted by the central authority on the advice of the Advisory Committee on certain conditions as to the collection of specimens (para. 87). That protective laws must be relaxed for the benefit of science is already recognised, not only in many European countries, but also in most of the States of the United States, and in some of the Provinces of Canada. It is interesting to find that as long ago as 1837 special privileges were granted to the scientific collector in the Grand Duchy of Hesse. The Commissioners recommend that the person receiving a licence should enter into a bond with responsible sureties, as is required by the United States Model Law on which the recommendation is based. That law, however, recommended fifteen as the minimum age for a licence, in order to enable the young student to collect at an age when he most requires encouragement. But some of the States which have adopted the Model Law consider fifteen too young. The applicant for a licence must be eighteen in New York or New Hampshire, and twenty-one in Massachusetts or New Jersey.

The Committee say these licences must be granted with discretion, and rightly so ; otherwise dealers and mere collectors will soon be again at their work of destruction under the guise of scientists. Perhaps the recommendation should have gone a step further, and dealt with subsequent transactions with the specimens obtained. The Swiss Law of 1904 (Art. 20) expressly provides that persons who are given facilities to collect for scientific objects must not trade in the specimens taken. Under the State laws of Minnesota (1897), Colorado (1897), Maine (1901), and Wisconsin (1901) such specimens can only be disposed of by way of exchange ; while by the law of Michigan (1901) they can neither be exchanged nor sold.

Penalties.—As to the penalties imposed by our law, all will agree with the statement in the Report that the most striking point about them is their inadequacy (para. 31). The fine is only one pound under the Act

of 1880 (s. 3) for every scheduled bird, and the same amount under the Act of 1894 (s. 5) for every protected egg in respect of which an offence is committed. In the case of an unscheduled bird the penalty is a reprimand and costs for the first offence and 5*s*. and costs for each subsequent offence. Provisions were inserted in later Acts for the forfeiture of traps and nets used in illegally taking birds (Act of 1896, s. 4), and for the forfeiture of any bird or egg illegally taken (Act of 1902, s. 1). The chief offenders are often rich collectors or their agents, on whom the risk of such trivial punishment has no effect. The Report recommends that the penalties should be considerably increased, and should include imprisonment in serious cases (para. 124); but even the penalties now suggested are far less severe than those imposed in some of the American States. In California, for instance, the punishment for violating the law protecting certain birds and their eggs is a fine of 25 to 50 dollars, or imprisonment for 25 to 150 days, or both fine and imprisonment (Californian Penal Code, 1897: amended by Statutes of 1901, chap. cclxxiv.).

Restriction on Liberation of Foreign Birds.—One of the many innovations proposed in the Report is that the liberation of foreign birds should be subject to the approval of the Ornithological Advisory Committee (para. 141). This suggestion is the result of the introduction of the Little Owl into this country. Five of these birds were released in Yorkshire by Charles Waterton in 1842 or 1843, but little seems to have been afterwards heard of them. Considerable numbers were set loose in Kent in 1874 by Mr. E. G. B. Meade-Waldo, and subsequently in the Midlands by the late Lord Lilford. These birds have multiplied and spread rapidly, and in many districts are now looked upon as a danger to young poultry and game on account of their predatory habits. It is interesting to note that the birds were introduced by well-known ornithologists, who obviously had no idea that the consequences in this country would be otherwise than beneficial. The Little Owl is, indeed, the first bird mentioned in Schedule I of the Paris Convention 1902, that schedule containing a list of birds to which absolute protection should be given.

It is not stated whether any European precedent exists for the restriction now recommended, but a very similar provision is in force in the United States, which for many years have had reason to regret the importation of the English sparrow. The Federal Law known as the Lacey Act, 1900 (s. 2) provides "that it shall be unlawful for any person or persons to import into the United States any foreign wild animal or bird, except under special permit from the United States Department of Agriculture."

Liberation of Birds illegally taken.—The Commissioners recommend that any wild bird illegally taken should be set free (para. 127). Our

existing law contains no such provision, but the recommendation follows the example of the Belgian Royal Decree of 1906 (Art. 9), and the Dutch Law of 1912 (s. 40).

Definition of Wild Bird to include Plumage and Skin.—Under the existing law it is an offence after March 15 to expose or offer for sale or have in control or possession any wild bird recently taken (Act of 1880, s. 3). After pointing out (para. 28) that the usefulness of this provision "is to a large extent nullified in the case of rare birds by the fact that the skins or plumage and not the actual birds are the objects actually sought after and sold," the Commissioners recommend (para. 116) that where necessary "wild bird" shall be read as including plumage, skin, or other part of such wild bird. Reference is made in the Report (para. 28) to the fact that in Holland the prohibition extends to skins of protected birds (Dutch Law of 1912, s. 2).

Prohibition of transport of Birds and Eggs illegally taken.—Again, when the Commissioners suggest (para. 119) that another loophole in our law should be blocked up by making it illegal to transport, accept for transport, or deliver any illegally taken birds or nests, they are fortified by precedents in the laws of Belgium, Holland and Switzerland, the Paris Convention, and the United States Model Law of 1886. It is doubtful whether a Departmental Committee has ever issued a Report bearing a deeper imprint of the laws of other lands.

Adoption of Paris Convention.—The last page of the Report contains a noteworthy recommendation (para. 155) that this country should adopt the terms of the Paris Convention 1902, which formed a European Model Law for the protection of birds useful to agriculture and embodied the results of the International Conference on the subject held in Paris in 1895. This Conference was attended by representatives of all the important European Powers, and the terms of the Convention were signed and ratified by most of them, though not by Great Britain. The grounds upon which Great Britain refrained from adopting the terms of the Convention are given in the Report (para. 151), but are quite unconvincing.

International Conferences.—The protection of birds is eminently a subject which lends itself to treatment on broad international lines. The Commissioners, at any rate, realise this fact, for they perhaps exceed their functions by saying (para. 156): "Finally, we recommend that the policy by which His Majesty's Government have in certain cases refrained in the past from taking part officially in international conferences on the subject of the protection of birds should be reversed, and that this country should be officially represented at and take its share in the promotion of such conferences."

THE ITALIAN LAW OF INDUSTRIAL PROPERTY.

[*Contributed by* J. W. GORDON, ESQ., K.C.]

THE Italians are proposing a considerable modification of their Patent Law in the near future, and the Italian Society for the Study of Industrial Law has issued a statement concerning the development of Italian law in this department during the war, and a notice of the projects prepared for submission to the Italian Parliament. The interests of the Society extend not only to patent law but also to the allied subjects of the law relating to designs and trade marks, as also to the law of copyright. But the law relating to copyright is not included in the subject matter of the Report now presented to the Society; it will form the topic of a later report to be made when definite proposals relating to that subject have been formulated for the consideration of Parliament.

The Society's report, although directed mainly to the elucidation and discussion of the contemplated legislative measures, is not confined to them, but includes also a notice of the steps taken during the war to meet the emergencies to which a state of war gave rise. These were much the same in all countries: such as permission given to make payment in enemy country of renewal fees, and such-like dues, for the keeping of rights alive; regulations made for preserving the secrecy of inventions of military value; compulsory licences granted by administrative authority to make use of patented inventions or registered trade marks to which proprietary rights were vested in enemy hands. But in one respect the provisions of the Italian law strike an English reader as being very mild. By special decrees the railway and postal administrations were authorised to employ patented inventions in the public service, and the Government to make use of any invention in the interest of public defence upon the condition of indemnifying the patentees. In this country the power to employ a patented invention for the public service is more ample and was not conferred by emergency legislation, for the simple reason that it is part of the general law of patents and covers inventions of every kind. It would seem that in Italy, even under the stress of war, the prerogative is much more limited. Similarly it would seem that special decrees were found necessary to take from enemy subjects the right to bring actions in the Italian Courts, the Italian law being in that respect assimilated to the German model. The points of difference from English law are of no substantial importance, but they are of interest as indicating that, although the makers of codes of law in modern times have aimed at liberal rules, the rules themselves become assimilated under the stress of practical necessities to those which centuries ago were developed in this country in the evolution of our common law.

Passing to the proposals for modifications of the law which are before the Italian Parliament, it may be noted that these are, for the most part, such as tend to assimilate the patent law of Italy to the more elaborate patent laws obtaining in the other leading countries. Thus, it is proposed to publish at length the specifications lodged at the Patent Office, to introduce a system of opposition by interested parties to the grant of a patent, and to impose upon patentees the condition of working their inventions within the country. With regard to the condition of opposition, it is by no means clear what is the exact nature of the proposal. In this country, for instance, opposition by third parties is limited to narrowly defined grounds of objection to the grant, and dealt with by a summary form of procedure, both at the Patent Office and on appeal. In other countries, on the contrary, and notably in Germany, much more extended grounds of opposition are open to the objector, and proceedings can be instituted which bear a marked resemblance to a patent action, subject to the condition that no question of infringement is involved. The wisdom of laying so great a burden upon the applicant for a patent is at least open to question. A patent right is not, as a rule, valuable, in an industrial sense, until it has been exploited, and though it is a matter of public importance that grants should not be made in respect of inventions not patentable according to the law, that end is very imperfectly attainable by the haphazard action of opponents to the grant. In fact, their action may be left out of account in this connection, it is so sporadic and uncertain. Conformity with the law must be secured by much more trustworthy means, and the opposition of third parties to the grant counted on only to safeguard the private interest of the objecting parties. In the system adopted in this country from the earliest times the object of preventing extravagant claims has been compassed by making the grant itself conditional upon the validity of the claim to patent right, which the patentee puts forward. In this way it has been made a matter of interest to the patentee himself to confine his claim to what he can defend when challenged, and herein lies the chief security of the public against exorbitant claims. In Italy a different principle has been adopted. It is quite true that the patent, when granted, is issued without any guarantee as to its validity, and that in duly constituted proceedings the validity can be called in question. But the Italian law provides that a legal decision upon that question must precede the use of a patented invention, if invalidity is to be made effectual as a defence to a charge of infringement. The exclusive right of user conferred by the grant is established by a rule which makes infringement a punishable offence, as if it were an assault or other breach of complainant's indubitable right. In this respect the law of Italy to-day resembles that which was administered here by the Star Chamber in the seventeenth century, a rule which, in fact, survived the passing of the Statute of Monopolies, although

to abolish it was one of the principal objects of Parliament in the framing of that Act, and which only disappeared from our law when the Court, which had administered that harsh rule, was swept away by a torrent of popular indignation. So long as this power of proceeding by correctional methods against alleged infringers of patent right remains it will undoubtedly be impracticable to engage the interest of the patentee in shaping a moderate claim. It must be to his interest to get a grant which, so long as it remains unchallenged, can be used to hold the threat of criminal proceedings over the head of a man with whom he desires to drive a hard bargain. There is, therefore, much more reason in Italy than here for subjecting applications for patent grant to jealous scrutiny, and the resulting inconvenience to the applicant does not seem to be any sufficient objection to the proposal. More serious is the consideration that, to judge from the experience of other countries—our own among them—proceedings in opposition to the grant will not be very effective in reducing claims to patent right within the limits of what may be legitimately claimed. If every claim were scrutinised, and every scrutiny conducted with consummate skill, the result might be one of public value. But, in fact, opposition to the granting of patents takes place at a stage in the life of a patent when its real value is not known with any certainty, and more probably miscalculated than valued aright. Much attention, in such proceedings, is bestowed upon things that do not matter, while matters of real but unappreciated importance pass unchallenged.

The harsh rule which treats infringement as a crime, and not merely as a tort, reacts in another way upon the substance of Italian law, and tends to cripple it. Thus, a proposal is now put forward that chemical products, and indeed any products apart from the manufacturing process, shall not be patentable. Some such limitation is no doubt necessary, if the mere possession of an infringing article is treated as a crime, or the patent law would be unendurably full of pitfalls for the ordinary man. But the restriction is so artificial that it is certain to give rise to successful evasion, and so to become of doubtful import. For instance, there are several ways known of making colloid solutions, but they are not all applicable to all colloids. Now a new colloid solution may be a very useful invention, and in such a case no doubt some way would be found of holding it patentable. If it could not be manufactured by any of the known processes that would be quite easy, the new process of manufacture would be patented, and the patent would secure the new product, which would thus be made indirectly the subject of a patent grant. But if the real value of the invention lay in the product and not in the process, the result would have been secured by an evasion that would point the way to other evasions of a nature, it might be, to defeat the real object of the law. It may well be that improvements in the Italian Patent Law are required, and even urgently; but it hardly seems likely

that the complicated provisions now in contemplation will give to it a final form. If the experience of Italy should prove to be like that of this country since we started in 1902 upon the process of patching our patent law, amendments will by no means tend to finality, but, on the contrary, to unsettlement. Every legislative experiment in turn suggests a new one, until legislation becomes an almost continuous process.

With regard to trade marks, the Italian proposals tend to assimilate the law to that of patents. An official examination is projected to prevent the registration of invalid marks, and power is to be given to persons injured by a registration open to objection to take action for the removal from the register of the offending mark. By a curious application of the principle which makes a chemical substance unpatentable, marks applied to chemical substances are to be declared open to common use under the condition that the manufacturer who appropriates the mark makes his identity clear as distinct from that of the original user. If this rule is adopted it will be interesting to see how it will work in practice. Undoubtedly there is a great tendency on the part of the public to adopt, as the name of a commodity, the trade mark under which it is sold, and when a particular manufacture has an extensive market this official name comes very commonly to be a popular name, by which not only the make of the goods in question, but also the goods themselves, are known. In such a case the owner of a successful mark obtains an unfair advantage over his competitors, and it is an advantage which in this country can be pressed home with the assistance of the Courts. The rule proposed for Italy will obviate that difficulty in the very numerous cases of this sort which arise in the drug and chemical trades. But it still leaves the anomaly untouched in the still larger field of general trade marks, so that it certainly will not wholly meet the case. Whether experience will suggest the extension or the abrogation of the rule can only at present be conjectured. It seems pretty certain that a rule at once so stringent and so circumscribed in its application, is not likely to be permanent in the form now proposed.

NEUTRALITY AND NEUTRALISATION IN THE SIXTEENTH CENTURY—LIÈGE.

[*Contributed by* W. S. M. Knight, Esq.]

Neutrality prior to Grotius.—Modern text-books of International Law, with few exceptions, either exclude all consideration of neutrality as existent in the sixteenth century, or refer to it, in relation to that century, in terms that implicitly or explicitly suggest that what then did exist having anything of the character of neutrality, in the modern acceptance

of the term, was so imperfect—the conception itself not even in being—as not to be worth, as neutrality, serious investigation and discussion All they say, as a rule, is that the idea and practice of the Grotian *medii* was the best that the period could show that was at all comparable with modern neutrality. Nor is there much excuse for this in view of the indications to the contrary which Nys published so far back, at the least, as the year 1892.[1]

Liège.—Several instances of sixteenth-century neutrality are on record, but as yet none of these, so far as can be discovered, has been investigated in detail. It is proposed to deal here with one of them, the *Neutralité Liègeoise*—a term, it should be noted, itself well known and of old standing in the histories and records of Liège.

Liège was a tiny, very loosely federated, State, no larger than a mere province, divided into four counties, and comprising, besides its capital city of Liège, twenty-four towns or villages known as *bonnes villes*. Its international political head was a Prince-Bishop, elected, in theory, by the people. He was a sovereign prince, but yet only the chief executive officer, the Estates of Liège sharing with him the right to legislate, conclude treaties, and make war.[2] Prince and principality owed allegiance to the Emperor, as constituent of the circle of Westphalia, and were under obligation to pay tribute and supply a quota of troops to the Imperial armies engaged against the Turks.

The political and strategic importance of this little State was very much greater than its size would suggest. It lay perfectly enclosed, a long narrow strip, within the Spanish Netherlands, at times, however, a southern extremity touching the confines of France. As occupant of the valley of the Meuse it separated the western Netherlands from the eastern, and commanded the road of France to the Rhine. It only needed that the Netherlands should pass from the House of Burgundy, that the Spanish Monarch, then their master, should become Charles V., German Emperor and its own suzerain, that the Empire should be riven by the forces of reform, that the Netherlands should revolt, and that France, enemy of England, should meanwhile initiate a policy of determined rivalry with Spain and the Empire, for the international position of Liège to become as delicate as that of any State known to history. And to this must be added the civil unrest and war, people against prince, from which Liège was never entirely free.

Establishment of a Conventional Neutrality.—In 1477–8, when war broke out between Louis XI and Maximilian of Burgundy, notwithstanding urgent proposals from each belligerent, Liège made formal declaration that she would preserve "a full and entire neutrality"

[1] *Notes sur La Neutralité*, c. 4; *Le Droit International*, iii. 559–60.

[2] Louvrez and Hodin, *Recueil des Édits . . . pour le Pais de Liège*, i. 2, 403, ii, 4, 17.

during the hostilities.[1] Of the precise facts of this there is little that is certain on record, except that tradition has it that the policy thus adopted was historically the origin of the neutrality with which we are more particularly concerned.[2] What did happen was that the principality at once plunged into a state of civil war, each side calling in foreign aid, and in the end found itself so completely exhausted, so helpless as against its neighbours, that it determined to abandon for ever all idea of war and to withdraw, in most formal and effective fashion possible, from all participation, or even interest, in the wars of the Powers around. The position was debated in the Estates. Resolutions were passed, in the above sense, that "the military role of the Liégeois was finished." The idea, clearly, was that Liège should herself henceforth be the abode of perpetual and perfect peace, though surrounded by Powers at war. She was "to continue in good and true neutrality"[3]—the actual words, it should be noted, were *bonne et vraie Neutralité*.

In order that this end should be regularly accomplished, it was determined, in 1492, to approach France and the Netherlands, and negotiate something in the nature of a convention, the particular instrument contemplated, in each case, being a Letters Patent. The negotiation was successful. On July 8, 1492, France engaged in formal manner that she would agree to and respect the "neutrality" sought by the resolutions of the Estates. The document by which this was done, the Letters Patent, is historically of such interest that it may well be reproduced here, the more especially as it has never yet appeared in an English publication, and can be found in the French original only in works not readily accessible:[4]

> Charles, by the Grace of God, King of France. To All to whom these Presents shall come, Greeting. Know all Men . . . that now and henceforth we are bound to the City and Principality of Liège to keep the peace by our captains and men of war, not permitting them during the said Neutrality [*Neutralité*] to forage, pillage, rob, or execute any warlike measures in the said principality; provided always that on their part the Bishop and Estates remain neutral [*Neutres*], without fraud, and inflict no damage upon us, our kingdoms, lands and lordships, and in no way whatever declare themselves to be our enemies, and that they neither favour nor lend assistance or aid to those who may hereafter make war upon us. In Witness whereof, &c.

A month afterwards, on August 8, a corresponding instrument was executed by the Sovereign of the Netherlands, and in this the Emperor

[1] Bouille: *Hist. du Pays de Liège*, ii. 185, 253; Hénaux, *Hist. du Pays de Liège*, ii. 237 n.

[2] *Ibid.*, Daris, *Hist. du Droc. de Liège, XV siècle*, 491.

[3] These resolutions are reproduced *in extenso* by Hénaux, ii. 237 n.

[4] The original version may be found in Hénaux, ii. 238 n.

himself joined. This also was in the form of a Letters Patent, and it was most carefully expressed in words identical with the Letters Patent of Charles VII.

And thus Liège became a neutralised State—"now and henceforth," in time of peace as well as in war. The parties to it were all the Great Powers of Europe—the Empire, Spain and her world-wide dominions, France, then herself about to commence her great struggle for the hegemony of the Continent. All these completely encircled Liège, and the convention itself was thus bound to react throughout the whole of Europe.

Was this Neutrality a Novelty?—In reading the resolutions and the Letters Patent, it is difficult to avoid a certain conclusion. They have no appearance of introducing into international relations unaccustomed or novel conditions, henceforth to be known as the condition of neutrality. On the contrary, the reasonable suggestion is that both the conception of, and the word itself, *Neutralité* were already well established, the Letters Patent themselves doing no more than work out in verbal detail the meaning, then well known and appreciated, of a quite usual term, neutrality. And the date of all this was the close of the fifteenth century.

The Treaty of St. Trond.—According to the historians of Liège this neutrality came to a premature end in the year 1518, after a short life of only twenty-six years, with the treaty of that year with the ruler of the Netherlands. "It may be," writes Hénaux, "that this close alliance was, from the commercial point of view, advantageous to both peoples. It was none the less destructive of the neutrality, the permanent safeguard and benefit of the country."[1] The historian Lonchay, too, regards the treaty as a violation of the neutrality; but he finds in the alliance one important guarantee of the safety and the independence of the principality.[2]

The treaty was, shortly, one of mutual defence. Did it, however, operate as these writers conclude? The point is of special interest in view of the attitude and action of the Estates in 1576, and of the recognition by the Dutch in the next century—a discussion of the details of which is outside the limits of this article—of the existence at that time of the neutrality established in 1492. At the same time it must be noted that the treaty, being personally concluded by the prince in opposition to popular feeling, was stigmatised by the Estates, at the time it was concluded, as a distinct and undesirable breach. France, too, protested on the same ground, very energetically. But thereupon, with sudden change of front, the Estates meet that protest with the contention that

[1] *Hist.* ii. 247.

[2] *De l'Attitude des Souverains des Pays Bas à l'égard du Pays de Liège au XVI siècle*, 33.

the treaty was quite lawful, a permissible measure for the protection of the independence, and even of the neutrality itself, of Liège.[1] The consequence was that in the ensuing wars between France and the Netherlands, later to be complicated by the revolt of the Netherlands and the armed adhesion of England to the Emperor's cause, Liège once more found herself, notwithstanding her neutrality, supporting as an ally, in accordance with the treaty, the operations of the Netherlands.

The alleged Abandonment of the Neutrality.—Shortly stated, this support is to be found, on several occasions during a period of about sixty years, in the active assistance of the Netherlands, chiefly by the supply of troops, the grant of passage through the principality, and by fighting the common enemy, generally France, either alone or in alliance with the rebels of the Netherlands.

If we agree with Arendt, whose views are adopted by Baron Descamps —considering this question from the point of view of Belgium—only so recently as 1902, Liège, notwithstanding her neutralisation, was free to enter into, with all it involved, an alliance such as that of the treaty of St. Trond. Her neutralisation was not accompanied by any guarantee either of her independence or the neutrality. France threatened, or was likely, in her opinion, to threaten both—at once the cause of and the justification for the alliance. "Nothing can prevent Belgium," declared Arendt, "in case of war, or if her neutrality appears to be menaced, from allying herself with a powerful neighbour."[2] And Descamps gives instances of practical attempts, made without any sort of concealment, both in Belgium and in Holland, to negotiate a Belgo-Dutch defensive alliance, these attempts, so far from having been reprobated by the Powers parties to the Belgian neutralisation, being watched by them with tranquil good wish.[3] Substantially the whole of the warlike measures of the ruler of the Netherlands with which Liège identified herself, even though France took part in them, were in attempted repression of rebellion. Quite apart from the alliance, Liège was here well within her rights as a neutralised State. One has only to glance again at the history of Belgium.[4] In 1832 and 1834 the then Portuguese Government was assisted against the Miguelists by Belgian troops; and in 1865 a Belgian corps was raised to support the adventure of Maximilian in Mexico. And in each of these cases the accepted justification of Belgium was the same. Her armed alliance or intervention was on behalf of a recognised sovereign, in order to aid him in quashing rebellion and bringing civil war to an end.

Inconveniences of this Treaty.—Apart from legal considerations, however, Liège was forced eventually to abandon the alliance of 1518.

[1] Lonchay, p. 17 n; Hénaux, ii. 238 n.
[2] *Essai sur la Neutralité de la Belgique*, 92.
[3] *La Neutralité de la Belgique*, 368.
[4] Descamps, 477–91.

Its practical effect was to place her, as before 1492, always substantially in the position of a belligerent. France, whenever she invaded the principality without warning, always excused her action by a claim that Liège was no longer neutral, but, because of the alliance, an enemy. And yet on other occasions, France, before moving, would invite Liège to declare a continuance of her old perfect neutrality.

Rehabilitation of the Neutrality. — The situation of Liège in time became so critical that she was forced to reconsider her position in relation to the treaty. Drained of all her resources and ravaged unmercifully both by friend and foe, her country and people were now on the verge of ruin. Well-being and security seemed possible only by a return to the unequivocal days of before 1518. And so, in 1576–7 Liège, with her prince and people united, in the face of all manner of persuasion and threats on the part of the Netherlands, refused to be bound any longer by the treaty.

The Tragedy of Huy.—But even then they were not to be saved absolutely from the illegalities of their neighbours. Indeed, William the Silent, champion of the faith and popular rights, was himself to commit against the principality an act of aggression which was as bad as—having regard to the principles upon which he founded his cause—if not worse than, anything the Liégeois had hitherto suffered at the hands of princes whose one frank profession was crudest absolutism. In 1595 he broke into the territory of Liège, and then, by surprise, craft, and superior force, seized the important fortress and town of Huy. His occupation lasted, however, no longer than forty-one days ; but the calamitous results to the Hutois were far out of proportion to the temporary character of the Dutch success. Suspected of treachery by its prince, the town was the scene of a massacre almost unparalleled in history ; "and after the bloody orgie of the soldiers followed an orgie, no less bloody, of the judges."[1] Grotius himself, in his *Annales*, gives an account of the Dutch violation of the neutrality of Liège, and, in giving it, by no means reprobates it. On the contrary, while admitting that it was a breach of international law, he justifies it on the ground of necessity—the occupation of the place was so convenient a measure for William in view of the general character of his operations.[2]

Grotius and Neutrality.—So closes the history of this neutralisation during the sixteenth century. Though Grotius, in his *De Jure Belli*, makes no reference to neutrality, as such, yet from his *Annales* it is certain that he had in fact some acquaintance with it. It is generally concluded that, when dealing with *medii*, he was dealing with those whose position was nearest neutrality in default of the existence, at the time he wrote, of the conception, the term itself, and the practice of true

[1] Hénaux, ii. 330–34 ; Grotius, *Ann. et Hist.*, iv. 206.
[2] Grotius, *ibid.* iv. 206.

neutrality. Either he overlooked, or designedly omitted all reference to, neutrality as such. The view cannot be accepted that the *medii* were to stand for neutrals as well as for those he described under the former term. The status of the *medius* was quite different and separate, in principle and in practice, from that of the neutral.

But the point of this paper is to suggest that research may result in establishing that neutrality, substantially as it is understood to-day, was in fact a conception and practice with which the sixteenth century was, if not generally familiar, certainly well acquainted.

"ROMAN LAW IN THE MODERN WORLD."

[*Contributed by* E. A. Whittuck, Esq., B.C.L.]

An outcome of a movement which is gaining ground in the United States to make Roman Law better known is a book with the above title (Boston Book Co.), by Mr. Sherman, Professor of Roman Law at Yale, where much pioneer work in teaching the subject has been done. The grounds on account of which Professor Sherman holds that his countrymen ought specially to apply themselves to this study are partly educational and partly practical. In respect of the latter he says:

> Roman Law should be studied fervently with a view to the betterment of our American Law, which sadly needs improvement, and which in so many respects—particularly by its lack of codification—is greatly inferior to other modern legal systems. Our system of precedents and case reports is breaking down from its own weight and becoming decadent. How soon will codification take place? We must study Roman Law with this aim in view, as have the French and Germans, if we wish our law to attain foremost rank, its proper station in the modern world.

Moreover, the study, besides preparing the way for codification, would, he thinks, by raising the character of the legal profession, soon have the effect of removing "the general unpopularity and growing disrepute into which law and the administration of law are falling in the United States," which is perhaps, he remarks, "the most glaring portent of the twentieth century."

Whether the study of Roman Law would bring about these results so quickly as Professor Sherman imagines may be questioned. He certainly takes too hopeful a view, if we may judge from our own experience, in supposing that merely making it "a prerequisite for admission to the American Bar, as in Great Britain and other European countries," would have such a consequence.

Of the powerful influence which schools of law may exercise on the

theory and practice of law there can, however, be no doubt, or of the need of this kind of influence for improving the character of the common law in both the great countries where it prevails. According to Professor Sherman, the master-key for such improvement is to be found in the study of Roman Law. It is the object of his book to show that Roman Law is the valuable element of all modern law.

The scope of the work is thus described in the Preface:

> The first volume . . . is a historical introduction to the development of modern law, beginning with the genesis of Roman Law as a local city law, describing its evolution into a body of legal principles fit to regulate the world, portraying its establishment as a world law, and ending with an account of the universal descent or reception of the civil law into the modern law.
>
> The second volume contains the principles of the civil law, more especially private law, arranged systematically in the order of a code, and illustrated, as to their survival, from Anglo-American law and the modern codes as copiously as space will permit.
>
> The third volume contains Roman and modern guides to the subjects of the entire book, an exhaustive general bibliography of Roman Law. The work is designed, we are told, to meet the requirements of various classes of readers; the general reader, the non-professional student, the law student, and the law teacher.

The book is not intended to be a regular textbook of Roman Law, though in some parts it has the character of an institutional treatise, and in others that of more advanced works like German Pandekten. But its special purpose is to make the existence of Roman Law in the modern world better understood, and to this end all its details are subordinated. Written in somewhat a propagandist spirit, it puts forward claims on account of Roman Law which are made subject to little or no qualification. In fact, the student, and especially the unlearned student, is led to suppose that there is nothing in modern law worth considering except the Roman element contained in it. Sweeping statements of this kind were formerly rife in the writings both of civilians and common lawyers, but they now appear to be out of date. If, however, the reader is able to discount the amount of bias in favour of Roman Law which Mr. Sherman shows, he may derive much benefit from the perusal of his work. It brings together a great deal of miscellaneous information connected with the history of the civil law which cannot easily be found elsewhere. It explains in outline the systematic character of Roman legal conceptions, and in its comparison of the rules of Roman Law with those of modern systems it enters on a field of inquiry which has been very little explored. The first volume mainly consists of a historical sketch of the civil law from its first beginning, when Rome was merely a city State, till the present time.

In this sketch the agencies by which the old *jus civile* was freed from its particularism, and so adapted to become a world law, are first described. Hereby it may perhaps be intended to suggest to the American reader that it would be well if American common law similarly abandoned its insularity. In this connection it might have been expected that the nature of the *jus provinciale* and the researches of Mommsen and more modern writers on this difficult subject would have been considered; but this does not appear to be the case. More particular attention is called to the long series of Roman jurists and their writings, and here and there throughout the book many interesting details are given as to the teaching of Roman Law. In his enthusiasm for everything that is Roman, the writer remarks that Roman legal education has correctly answered for all time that vexed question of the right methods of legal study. There are interesting sections in this part of the book about the influence of Roman Law on early Christianity and of Christianity on Roman Law, subjects on which patient and impartial research is still much required.

In his account of the history of the Roman Law till the time of Justinian's compilation of it, the book is on the same ground as that more fully treated in well-known English textbooks such as Roby's *Introduction to the Digest*, Clark's *Roman Private Law*, Muirhead's *Roman Law*, and Ledlie's edition of Sohm's *Roman Law*. These are frequently cited. Sometimes, it may be noticed, both here and elsewhere English books on Roman Law are referred to which carry little weight with us. The most interesting part of the book, especially to the student of comparative law, is that which traces the long history of the civil law subsequent to Justinian. In this much stress is laid on the importance of Byzantine Law. For this purpose use is made of the researches of recent English historians, and particularly of those of Professor Bury, as well as of well-known German writers on the subject; perhaps hardly sufficient account is taken of Mitteis. The importance of Byzantine Law, according to Professor Sherman, is that it has been one of the two main channels by which Roman Law has descended to the modern world, the other in the West coming directly from Justinian and ante-Justinian legislation. These two sources, he tells us, have eventually merged in one another, and by means of them, either separately or collectively, Roman Law has spread over the world.

> The modern domains of Roman Law (we are told) extend far beyond the vast empire of the Cæsars. The entire Continent of Europe, the entire New World with its twin Americas, an ever-increasing portion of Asia and Africa, constitute the provinces of the vast modern realm of Roman law.

The principal means by which this realm has been extended in the East beyond Roman confines has been, as is alleged, modern codification,

all modern codes being regarded by Professor Sherman mainly as the offspring of Roman Law. Thus, according to him,

> the laws of Russia, the Balkan States, Turkey, and Egypt, with their ancient parentage from the law of the Eastern Roman Empire, are now codified through the influence of the modern Western Codes (especially the Napoleonic)—which have been inspired by Justinian's grand codification.

Either in this way or by the power Byzantine Law has continued to exercise, Roman Law has, we are told, almost everywhere permeated the Eastern world, not even Abyssinia, India, China or Japan, and other far distant lands, being excluded from its sphere of influence.

As regards the extension of Byzantine Law, it may be noticed that the questionable dictum of Professor Amos—which asserts that, "if the Mohammedan religion is nothing but Hebraism adapted to an Arabian soil, it seems also true that Mohammedan Law is nothing but the Roman Law of the Arab dominion"—is approved. On so open a subject such a wide generalisation is surely rash. Even as to the amount of influence which Roman Law has continued to exercise in the Western world—though this is a subject which for ages has been under discussion—there is still very little agreement among scholars. Professor Sherman, however, is strongly of opinion that the predominant element of all law in European countries is Roman. He is obliged to recognise that some Western States have received the texts of Roman Law as binding authority, while others have not; but he maintains that they are all more or less under the dominion of Roman legal conceptions. In this respect no exception is made on account of English and American Common Law; this, it is admitted, has been less subject than the law of European countries elsewhere to Roman influence, which is regarded as a misfortune to it. Of early English Common Law it is remarked:

> From the coming of Vacarius to Oxford in the middle of the twelfth century to the end of the reign of Edward the First over one hundred and fifty years later, the influence of Roman Law on the formation of English Law was so great that this whole period should be styled the "Roman epoch of English legal history."

During this period, and even for some time afterwards, the text asserts, the Digest could be cited in our courts of common law not merely as illustrative and secondary testimony as at present, but as primary and practically conclusive. This is inferred from the fact that citations from the Digest are to be found in the Year Books. The view appears to be that increasing antipathy to Roman Law on account of its foreign and imperialistic character had the effect in later times of enabling the common lawyers to deprive the civil law of any direct authority. Even our constitutional law this treatise connects closely

with Roman institutions and ideas. Thus it derives the institution of trial by jury from the Roman judices, which is contrary to the opinion of the best constitutional authorities such as Brünner and Stubbs, who trace its mere germ to a different Roman origin of an administrative kind. Even Magna Charta itself is attributed to a Roman source. "Whatever," it is asserted, "was remembered of Roman civilisation as created by Roman Law was preserved through the beneficent influence of the mediæval Church. The source of Archbishop Langton's inspiration" (of Magna Charta) "is plain: Magna Charta was drafted in the light of civil liberty as proclaimed in Roman Law."

The use which Bracton, who is called the Father of the Common Law, made of Roman Law, is of course noticed, but in doing so no account seems to be taken of Maitland's *Comparative Study of Bracton and Azo*, which goes to show that Bracton's acquaintance with and use of the civil law was only of a superficial kind. Littleton is said in the text to have been the first true expositor of the common law. The book has some interesting sections on the sixteenth century revival of Roman Law study in England. It dwells on the triumph, as it calls it, of equity over common law in the seventeenth century, and thus, as it is suggested, of the triumph of Roman influences. It sketches the character of the subsequent progress of English Law till the consolidation of law and equity and the codification of some parts of English Law in recent times. Professor Sherman evidently regards the study of Roman Law in England at present as being in a flourishing condition, and he recognises not a few English legal writers as even entitled to be called civilians. The student of legal history and of comparative law will find much useful information in the sketch of the legal development of Italy, France, Spain, and Germany, and of other States. In this, particular attention is called to the attempts that have been made to codify the law of these countries. Perhaps undue importance is attached to the ordinances of Louis XIV and XV. The German Civil Code is said to be one of the greatest and perhaps the best exposition of Roman Law ever framed. It should have been pointed out, however, that the final draft of this code contains much less Roman Law in it than the first which was drawn up chiefly under the influence of Windscheid.

The second volume of the book contains a systematic study of Roman Law, together with a concurrent investigation of modern law, in order to show the debt of modern jurisprudence to Roman Law. The order of subjects followed is that of the French code. Roman legal institutions, public as well as private, are sufficiently described for the writer's purpose. This is done in a clear and, generally speaking, accurate way. Here and there, it is true, we find statements which are wanting in precision and completeness, such as, *e.g.*, those defining the Roman gens and the relation of agnates. Moreover, it seems misleading to

distinguish, as the text does, only two kinds of possession in Roman Law—viz., (1) detention, and (2) possession leading to prescription. For this leaves out of account mere interdict possession which, unless the property is vindicated, is protected against everyone except one from whom it has been acquired *clam, vi,* or *precario.* Such possession is therefore recognised, although the requisites for usucaption or prescription may be absent. Again we find no mention made in the text of the retrospective method of assessing damages under the *lex aquilia*; it does not seem to be a sufficient justification for this omission that damages are not assessed in this way in modern law. Again, to say, as is done, that "the gratuitous character of mandatum may explain why the Roman jurists never worked out a theory of consideration" does not appear, on the face of it, to be a satisfactory conjecture; while the statement, "a consideration existed in some of the Roman real contracts," requires explanation since, according to English case law, there is enough consideration to support all real contracts alike, not even excepting deposit. In the task, which Professor Sherman undertakes to some extent in this part of his work, of comparing the rules of Roman Law with those of modern law, examples of similarity between them are, of course, ready to hand, especially in the great codes of Continental Europe. The examples which he gives of rules of the common law taken from Roman Law require more consideration than he gives to them in the text. Moreover, for the purpose of comparative study it is not enough to dwell on points of similarity between different systems of law; points of contrast and changes in the character of rules should also be distinguished. But any full account of this subject would have taken up more space than the plan of the book could afford.

We must be thankful to Professor Sherman for the great amount of knowledge which he has brought to bear on a very important subject. He has illustrated in greater detail than any other English or American writer the working of the catholic spirit by which Roman Law has spread over the world and is still active in it in modern times.

DISABLED FIGHTING MEN.

[*Contributed by* His Honour Judge Parry.]

The Carnegie Endowment for International Peace has published an account of the War Pension systems of Great Britain, Canada, France, Germany and Austria, and the United States.[1] It opens with a short

[1] *Carnegie Endowment for International Peace: Preliminary Economic Studies of the War.* Edited by David Kinley.—*Disabled Soldiers' and Sailors' Pensions and Training.* By Edward T. Devine, Professor of Social Economy, Columbia University, assisted by Lilian Brandt. (New York: Oxford University Press, American Branch, 1919.) Pp. iv + 471.

history of War Pensions of the past, deals in detail with the evolution of the various systems in each country, and describes what is called "The New Program." Although each pension system has its national characteristics in supplying medical treatment and making money payments, many of which are of old standing, a new element has arisen, and everywhere we find a national policy is being adopted of assisting the disabled man to resume an independent position in social and economic life. "The New Program" is to enable the lame, the blind, the deaf, and the man with a racing heart or scarified lung tissue "to lead a productive life and be a contributing member of society."

Although the volume is dated 1919 the editor points out that the manuscript was completed in October 1918. No account therefore is given of recent developments in our own system. There is no description—and perhaps as yet there could be none—of the new regional system of administration that we have recently adopted. On the other hand we have an interesting history of the new legislation in the United States, culminating in the War Risk Insurance Act, 1917. This establishes an insurance fund from the compulsory allotment of part pay of all enlisted men, augmented by an allowance by the Government. Out of this fund compensation for death or disablement in the late War is paid by the Bureau of Pensions.

Following the universal precedents of history, our countrymen, released from immediate personal danger, are not at the moment so loudly interested in pension matters as they were two years ago. It is not that generous instincts are dead, but, having been overstrained during the War, they have become dormant. Moreover, bureaucracy having largely superseded voluntary effort, there are not so many intelligent citizens immediately interested in the study of the subject. At the same time there must be a considerable number of social students in this country who will welcome the opportunity afforded by this book of studying the pension systems of the world.

It has been difficult for the average citizen of this country to understand anything of his own system. We have no official history or lucid departmental handbooks of our own, so that we must be grateful to America for providing us with much material that up to the present has only been available to those who have access to original documents.

The Rules and Regulations of our Ministry of Pensions are issued spasmodically in circulars, which from time to time amend, extend, or annul former circulars. When there is time to codify and co-ordinate these, and publish them in connection with their appropriate statutes and warrants, edited and indexed on the model of the publications of the American Pension Bureau, not only will they be more serviceable to harassed officials, but the general public will be able to take an intelligent interest in the work that is being done.

Even the pension authorities themselves are apt to be unduly pessimistic about their achievements. Sir James Craig, Parliamentary Secretary to the Ministry of Pensions, speaking at Nottingham on October 22nd, 1919, is reported to have said that on his accession to office " the delays constituted a perfect scandal, and they were horrified to find not only weeks and months of arrears of work, but even years, in every department. Apart from delays, however, the human touch was almost lost, and it was almost impossible to prevent autocracy in a machine which ought to be a human affair."

The picture is probably overdrawn, and in any case the trouble is due to the system rather than the individuals who work it. One cause of the loss of human touch is doubtless due to the fact that the rank and file of the officials have no clear idea of the aim and objects of the machine of which they are component parts. A book such as this should be part of the equipment of every pension official, for no man can take a lively interest in work the object of which he does not understand.

As an instance of how easily public servants may be blamed through public want of knowledge of their work, Professor Devine calls attention at no undue length to the position of the Statutory Committee of 1917. This voluntary body has hitherto had scant justice done to its activities. It was placed in an almost impossible position owing to the fact that it had not the necessary powers to carry out its decrees, being but a statutory conduit pipe to convey the wishes of Local Committees to officials at the Admiralty, the War Office, or Chelsea, who cared for none of these Committees. To the man in the street they appeared to be like a driver on the box who had lost control of his horses, but the onlooker did not know that the driver had not been provided with reins or a whip. Professor Devine, who seems to have had access to much detailed information, tells their story at length for the first time, and rightly sums up their short year's work as " exceedingly creditable."

Not only is it well that the Statutory Committee should have tardy justice done to its efforts, but a lesson may be learned for future use. Had it not been for the hustle of the times, the members of the Committee would probably have insisted on clear terms of reference and definite powers. Much of our pension muddle arises from want of clear definition of duties and simple instructions to officials as to the scope of their work. Good staff-work is essential to pension administration. Lord Haldane's Committee on the Machinery of Government pointed out " that in the sphere of civil government the duty of investigation and thought as preliminary to action might with great advantage be more definitely recognised. It appears to us that adequate provision has not been made in the past for the organised acquisition of facts and information, and for the systematic application of thought as preliminary to the settlement of policy and its subsequent administration." This is pecu-

liarly true of War Pensions, an entirely new subject to English Bureaucrats, who hitherto have left the investigation of its facts and information to social students such as Professor Devine.

Our departmental illiteracy is the more to be deplored because this problem of pensions, as the Professor points out, raises the whole question of the human waste caused by disablement not only in war but in industry. "The experience gained," he writes, "from the treatment of those disabled in battle should be extended in time of peace to those who suffer from industrial accidents." Hitherto all nations have relied too largely on mere doles of money. The future will find that society has a collective responsibility in the training and treatment of all its disabled members, and that no useful work can be done except in co-operation with the injured man himself. Without the human touch money may be poured out in vain. "The ambition and will of the individual are the key to the situation." To awaken these qualities in the invalid and the cripple requires a human sympathy not always a characteristic of the minor Government official This is a lesson in social economy that the world has yet to learn.

THE INITIATIVE AND REFERENDUM IN CANADA.

[*Contributed by* PROFESSOR BERRIEDALE KEITH.]

IT is significant of the strong influence of the United States on the political conceptions of Western Canada that, within a decade from the grant of provincial status to Saskatchewan and Alberta, these provinces should have sought to establish, in supplement of the normal mode of legislation, a procedure by initiative and referendum. Saskatchewan led the way in Chapter II of the Acts passed at the first session of the third Legislature.[1] It enacted that an Act of the Legislature, other than a supply measure, should not come into force until ninety days after the close of the session at which it was passed, unless a contrary intention was set out in the preamble to the Act, and the Act was passed on the third reading by a two-thirds majority of the Members present. Any number of electors, not being less than 5 per cent. of the total votes cast at the last general election, might, however, present a petition to the Lieutenant-Governor-in-Council asking for a referendum, and in this event the operation of the Act was to be suspended until a poll of the electorate was taken. If at this referendum the majority of votes was in favour of the measure, the date of its operation fell to be decided by the Lieutenant-Governor-in-Council, while, if the majority were against the Act, it was to be repealed. At the

[1] Cd. 6863, pp. 28, 29.

same time power was given to electors not less in number than 8 per cent. of the total votes at the last election to petition the Legislature for the enactment of any measure in the terms set out in the petition. If the measure were not enacted as desired, it fell to be submitted to the electorate, and, if passed by a majority of the voters, it became incumbent on the Legislature to enact it without substantial amendment.

Saskatchewan at the same time provided that the coming into operation of this system should be referred to the electorate, and should only be brought into force if approved by a majority vote, not less than 30 per cent. voting. Though a majority of votes was recorded in favour of the measure, the total vote fell short of the number required, and the Act therefore never took effect. Alberta,[1] however, adopted a modified form of the proposed legislation, in which the number of electors who could demand a referendum on an Act of the Legislature was fixed at 8 per cent., and the proportion increased to 20 per cent. in the case of an exercise of the initiative. Both in Saskatchewan and Alberta the initiative was not to be applicable to any measure imposing a charge on the public revenues, or which was not certified by the Attorney-General to be within the legislative sphere of authority of the province.

Both Acts displayed an uneasy consciousness that the attempt to confer direct legislative power on the electorate was hardly likely to be held good by the Courts, and care was taken to preserve the appearance of action by the Legislature, though a duty was imposed on that body to repeal measures disapproved by the electorate in a referendum, and to enact any measure approved on an initiative. But, for reasons which I have given elsewhere,[2] it appears to me that an enactment which seeks to deprive a deliberative assembly of any power of exercising its essential function could not possibly be upheld by the Judicial Committee.

It is, however, a much narrower issue on which the Judicial Committee have judgment in the case of the Initiative and Referendum Act (6 Geo. V, c. 59) of Manitoba.[3] In that province no attempt was made to conceal the revolutionary character of the proposal. The power of initiating legislation, even dealing with supply,[4] was conferred on electors not less in number than 8 per cent. of the votes recorded at the last general election; the Legislature was given the opportunity of passing the proposed Bill at the session during which it was submitted, but, if it failed to do so, the Bill fell to be submitted to a referendum held contemporaneously with the next general election,

[1] Cd. 7507, p. 29.
[2] *Imperial Unity and the Dominions* (1916), pp. 124–7.
[3] 35 Times L. R. 630.
[4] Contrary to s. 90 of the British North America Act.

or, if desired by the petitioners, to a special referendum. If passed by a majority of voters at the referendum, it was to take effect without any intervention of the Legislature, "subject, however, to the same powers of veto and disallowance as are provided in the British North America Act or as exist in law with respect to any act of the Legislative Assembly, as though such law were an Act of the said Assembly." Similarly, electors, numbering not less than 5 per cent. of the votes cast at the last election, might petition for the repeal of any measure, when the same procedure would apply, with the difference that, if a referendum were held and a majority of voters favoured repeal, the Act would automatically be repealed.

It was obvious that so remarkable a measure must be submitted at once to judicial criticism, and, exercising the convenient power of reference to the Court of King's Bench, the Lieutenant-Governor-in-Council brought before that body the question of the validity of the chief sections of the Act. By consent a formal decision was arrived at that the Act was *intra vires*, and the real argument was reserved for the Court of Appeal, which pronounced against the validity of the sections impugned, either absolutely or taken in their context.[1] By a procedure, to which the Judicial Committee has not unnaturally taken exception, the final decision has been arrived at without the intermediate process of consideration by the Suprene Court of Canada, but the decision arrived at is one which in any case was inevitable, and this may be held to excuse the mode of action adopted.

The ground of decision chosen by the Judicial Committee was the simple, if technical, one that the power of alteration of the provincial constitution given to the Legislature by s. 92 (1) of the British North America Act does not apply to the office of Lieutenant-Governor, while the Manitoba Act not merely compels him to submit a measure to a body of voters totally distinct from the Legislature of which he is the constitutional head, but renders him powerless to prevent it becoming an actual law if approved by a majority of the voters. On the last point a fight was made for the validity of the Act on the ground of the saving clause, cited above, regarding the retention of the power of veto and disallowance; it was contended that the veto referred to must be the right of the Lieutenant-Governor to refuse assent to a measure approved by the voters, nor in fact is there any doubt that this was the intention of those who used this very inaccurate phraseology, for it is impossible to accept their Lordships' view that the term "veto" could apply to the powers of the Governor-General under s. 90 of the British North America Act, to which reference was obviously made in the term "disallowance." But technically it was easy to overrule

[1] *Re Initiative and Referendum Act*, 27 Man. 1.

this argument, for the same carelessness of drafting[1] which used the popular but unscientific term "veto" had employed the term "Act" in lieu of "Bill or Act." Much more convincing, however, than these refinements was the obvious fact that, in permitting (s. 11) the repeal of an Act automatically on a referendum, the Legislature had deprived both the Lieutenant-Governor and the Governor-General of their due control of legislation.

Their Lordships, as usual, in view of this decisive ground for disposing of the case, refrained from pronouncing any decision on the question of the limits of the power of delegation possessed by provincial legislatures, as asserted in *Hodge* v. *The Queen*.[2] But they indicated clearly enough the trend of their opinion when they laid stress on the fact that in the case of Canada the provinces possess no residuary power of legislation, nor can it be really open to much doubt that it is impossible consistently with the exclusive character of the powers of the provincial legislatures as stated in the British North America Act for these legislatures to set up with parallel authority other bodies of a legislative character. If this be the case, and, if the ingenious device of Alberta be finally disapproved, the desire of the provinces for the initiative can be gratified only by an amendment of the British North America Act, for which it would be difficult to make out a satisfactory case.

LEAGUE OF NATIONS SOCIETIES CONFERENCE.

THE third international conference of League of Nations Societies was held at Brussels on December 1, 2, and 3. Neutral countries took part for the first time. About a hundred delegates were present in all, representing sixteen allied and neutral countries. Baron Descamps, of Belgium, presided. The United States was not represented, and a sympathetic telegram was sent from the Conference to the League to Enforce Peace, expressing the hope that circumstances would soon allow of the resumption of their active co-operation.

The Conference worked through committees, whose conclusions were subsequently reviewed by the full Conference. Voting was by countries.

The Conference evolved a scheme for a permanent international federation of League of Nations Societies, with provision for a joint managing council, a central bureau at Brussels, and occasional plenary conferences. The scheme was only adopted provisionally, and was to come up for revision at the next Conference, to be held in Rome, and

[1] "Act" in the sense of "Bill" is found elsewhere also—*e.g.*, in ss. 68 and 1 of the Government of India Act, 1915.

[2] 9 App. Cas. 117.

in the meantime was to be referred to the various national societies for consideration.

The Conference decided to constitute a commission to draw up a scheme for an International Court of Justice, in the light of the League of Nations Covenant, and taking account of previous conventions and proceedings. It was stipulated that there should not be more than one judge of any one nationality ; that in the election of judges the principle of equality of States should be accepted ; and that the election should be made from a list of candidates, nominated by the States, each State having the right to nominate a number (to be determined) of candidates of its own nationality, and (with the object of emphasising that the judge is exclusively in the service of justice) a larger number of candidates of other nationalities.

The Conference also decided to constitute a commission to formulate a declaration on the rights and duties of nations, to be submitted to the next Conference, and a commission to draw up, with the aid of the Institut de droit International and the special associations, a scheme for a Code of International Law, which the Federation of League of Nations Societies should study and submit to the Governments of the associated States.

Resolutions were passed recognising the continuing operation of the Hague Conventions and other International Conventions relating to arbitration, mediation, conciliation, and inquiry ; recommending the creation of a special organ for conciliation with a view to the differences contemplated by Art. 15 of the League of Nations Covenant ; and maintaining that the members of the League should submit to arbitration all their differences which are susceptible of judicial regulation, and which are not settled by diplomacy or conciliation, the Council of the League being the body to decide whether a difference comes within this category if one of the parties contests the point.

It was recommended that the method of appointment of national representatives on the Assembly of the League should be left to each State to determine, but that each national society should conduct propaganda in its country and Parliament in order to secure that the method should be as democratic as possible. The League was urged to admit to membership as soon as possible all States complying with the conditions of Art. 1 of the Covenant, and to give effect to the powers of Art. 4 as to enlargement of the permanent representation of the Council of the League. It was also decided that the League should be invited to formulate as soon as possible the principles for guaranteeing to nationalities comprised in the territory of each State civil equality, religious liberty, and free use of their language.

Resolutions were passed recommending that practical measures be taken for bringing about the progressive reduction of armaments ; laying down certain principles which should govern the execution by the

League of its powers with respect to mandates; and advocating more complete measures for international organisation in matters relating to labour and industry, and for securing an adequate standard of education in all countries. The League was recommended to establish commissions and bureaux for health, commerce, education, and science, on the lines of the international labour organisation which has recently held its first Conference at Washington.

The methods of procedure at the Conference and the facilities for translation of speeches, resolutions, and amendments, and for the copying and circulation of documents left much to be desired. It is urgently necessary, in the interests of international co-operation, that good methods and rules should be evolved and established for the conduct of International Conferences, which are likely to be of frequent occurrence now that the League of Nations is becoming an actual fact.

F. N. K.

SOUTH AFRICAN LEGISLATION RELATING TO MARRIAGE OR SEXUAL INTERCOURSE BETWEEN EUROPEANS AND NATIVES OR COLOURED PERSONS.

[*Contributed by* E. L. Matthews, Esq., K.C., C.M.G.]

It is but ten years since the four British possessions in South Africa possessing Parliamentary institutions agreed to be united under one Government in a legislative union; and although during that period much has been accomplished in unifying the laws which were in force in those possessions when the Union was established, it has not yet been found practicable to enact a Union marriage law. Each of the four colonies had, of course, its marriage laws; those laws still remain in force, and the capacity of a member of a European race to contract a lawful marriage with a member of an aboriginal native race, or with an Asiatic, or with one of mixed blood, still depends on the province of the Union in which the marriage is sought to be solemnised. In 1911, during the first session of the Union Parliament, the Government introduced a Bill which, if it had passed, would have enacted the same marriage law for the whole Union, and which, if it had passed without amendment, would have contained no prohibition against marriages between members of different races.

Diverse sentiment prevented any agreement on the matter; the Bill was dropped, and is unlikely to be reintroduced with or without any such prohibition. The differences in the points of view are probably historical, that is to say, they arose out of the differences in the legislation which was then on the statute books of the four colonies, and also to

some extent out of the history of the four provinces. The Transvaal and the Orange Free State were, up till 1900, Dutch Republics. Cape Colony had been a British possession during the whole of the nineteenth century, while Natal legislative history is also that of a British Colony. It will be seen, therefore, when reference is made to the marriage laws of each of the colonies, that the different points of view disclosed therein arise from these facts of history.

Cape.—On September 7, 1838, by an Order of the Queen-in-Council, provision was made for the solemnisation of marriages in "British Colonies, plantations, and possessions abroad." The Order recites that—

> since the abolition of slavery in those colonies, plantations, and possessions, the marriage laws thereof have been found inappropriate to the altered conditions thereof, and inadequate to the increased desire for lawful matrimony therein; and therefore that it is expedient and necessary to amend the said marriage laws, and to adapt the same to the altered state and condition of society in such colonies, plantations, and possessions.

The Order, which contains the usual provisions as to the persons who may solemnise or be appointed to solemnise marriages, and the forms and essentials of a valid marriage, took effect in Cape Colony on February 1, 1839. Local legislatures—among which the legislature of Cape Colony was specifically included—were expressly empowered by the Order-in-Council to provide for its better adaptation to the local circumstances of the colonies, etc., to which it applied, *provided the adaptation was not in contradiction to or repugnant to any of its provisions*; such local legislation was to be confirmed or disallowed by the Crown, according as it was not or was so repugnant. It would seem, therefore, from the preamble to the Order as well as from some of its terms, that, so far from prohibiting mixed marriages, it contemplated such marriages; otherwise, the reference to the abolition of slavery and the altered conditions of society consequent on the abolition is inapposite. One of the sections of the Order validated marriages contracted prior to the abolition of slavery; both marriages between slaves, and marriages between parties one of whom was a slave and the other a free person. This Order-in-Council is still the principal marriage law of the Cape Province; it was not amended till 1860, and then merely to provide for the appointment of Jewish and Mohammedan marriage officers, and the later amendments deal with such matters as special licences, registers, and prohibited degrees.

In the Cape Province mixed marriages have not been uncommon, and particularly in the urban areas marriages between white men and half-caste women, and even the converse, have been frequent. No questions of importance have arisen specially from such marriages. Rights of property, succession, and other incidents, are the same as in

the case of lawful marriage between persons of the same race. It is, of course, outside the scope of this memorandum to discuss marriages by native custom and the incidents thereof.

Natal.—The history of the marriage law of Natal is similar to that of the Cape Province. In 1845 Natal became separated from Cape Colony, and by Ordinance 17 of 1846, the Crown Colony legislature proceeded to extend the provisions of the Order-in-Council of 1838 to "the district of Natal as a distinct colony separate from the Cape," the Ordinance containing a preamble that the Order-in-Council should, as far as it can be applied, extend to Natal.

The Ordinance was not amended till 1881, and then mainly to enable Mohammedan priests and Jewish ministers to be appointed marriage officers to solemnise marriages according to the rites of their faith. Law 46 of 1887 was passed to regulate the marriages of aboriginal natives according to Christian rites, that is to say, to enable the Order-in-Council and the Ordinance of 1847 to apply, subject to special variations not material to this article, but that law assumed throughout a marriage between native and native.

The Indian Immigration laws also contained provisions for the marriages of Indian indentured labourers with Indian women. But under the Order-in-Council and the Ordinance of 1847, which is the principal marriage law of Natal, there was, as in the Cape, no bar to marriages between Europeans and members of other races. Such marriages have, of course, taken place, but to nothing like the same extent as in Cape Colony. Reference will, however, be made presently to some questions which have come before the courts owing to such marriages, questions which arose owing to certain other special laws of governing aboriginal natives.

Transvaal.—The South African Republic approached the question of mixed unions from an entirely different standpoint. The republic had more than one written constitution, and one of the cardinal principles of each was that white and black were not to be on an equal footing. The latest *Grondwet*, or Constitution, prior to the British annexation was Law 2 of 1896. Art. 9 of that law was in the following terms: "The people will not permit any equalisation of coloured persons with white inhabitants." This article was to be found in the earlier constitution in similar terms from 1852 onwards. Law No. 3 of 1871 is still the principal marriage law of the Transvaal. It makes no provision for marriages other than those of white persons. Section 27 of this law expressly enacts: "All provisions of this law refer only to white persons, both as regards solemnisation of marriage and the persons who are married; while the marriages of coloured persons shall be regulated by separate Ordinance." No such separate Ordinance was passed until 1897, when Law No. 3 of that year solemnly enacted that—"Male and female

coloured persons who have reached marriageable age may contract a lawful marriage with each other under this law." The law then proceeds to prescribe the forms and ceremonies. The language of the preamble to this law sufficiently indicates the prevailing sentiment as to coloured persons in regard to marriage. It recites that—

> Inasmuch as the People allows the dissemination of the Gospel amongst coloured persons, and inasmuch as provision was made by Law No. 3 of 1871 that marriages of coloured persons should be regulated by law, *and inasmuch as the People will not tolerate any equalisation between white and black in Church or State*, and inasmuch as there are coloured persons who by education and civilisation have become distinguished from barbarians, and who therefore desire to live in a Christian and civilised manner, and accordingly wish to be lawfully united in marriage.

Then follows the enacting clause set out above. A " coloured person " is defined as being a person belonging to *or being a descendant of* any native race in South Africa, as well as a person belonging to one of the races mentioned in Law 3 of 1885. That law is the one imposing special disabilities on the ownership of land by Asiatics. This definition was repealed by a Crown Colony Ordinance (No. 39 of 1904), and a new definition substituted whereby a coloured person is to mean a person who is manifestly a coloured person, and whose marriage on that account cannot be solemnised under Law 3 of 1871. The marriage law of 1897, therefore, applies to the marriages of aboriginal natives—half-castes and Indians and Asiatics. Neither under the law of 1871 nor under the law of 1897 would a marriage officer or minister of religion solemnise a marriage if one party were a European and the other a coloured person ; or if he did he would be guilty of an offence. Presumably, though the matter has never come before the Court, such a marriage would be held to be outside any law and therefore invalid. And yet there is, in section 17 of Law 3 of 1897, an indication that, either before that year or possibly even before 1871, there had been such marriages, inasmuch as that section states that the law applies to the estates of deceased white persons who have been married to coloured persons. Whether this refers to persons only who had married outside the Transvaal but settled therein it is impossible to say. The section was expressed to be enacted " notwithstanding that marriages of white persons with coloured persons are not allowed under *this* law." The preceding section (16) had provided for the administration in terms of rules made under the Orphan Chamber law, of the estates of deceased coloured persons married under the law.

Orange Free State.—The public sentiment in the Orange Free State has always been as much against mixed marriage as it has been in the Transvaal. But the marriage law (No. 26 of 1899), passed just before the South African War and repealing an earlier one, contains no pro-

hibition, express or implied, of such a marriage. For all that appears in the statute, such a marriage would be lawful and could be solemnised under the terms of the law.

Section 28 enacts that nothing in the law is to prevent children born of heathen parents, though the latter may not have been legally married, from taking by way of inheritance the lawfully acquired properties of such parents, where it is proved that the parents regarded one another as husband and wife and lived with one another as such; and nothing in the law is to prevent unmarried heathen parents from holding and exercising the same rights over their children that they would have had if the children had been born in lawful wedlock. This is the only reference, implied or otherwise, to colour, and the inference seems to be that the law regulated the marriages of coloured persons as well as whites, and, if so, it would also regulate marriages between white and coloured persons.

Further, chapter xxxiv. of the Law Book, which places restrictions on the ownership of landed property by coloured persons (including full-blooded natives), enacts that "coloured persons born of a lawful marriage between a white father and a coloured mother are competent to buy and sell fixed property and have it registered in their names."

Notwithstanding this, however, it may be said that the prevailing sentiment in the Free State has been a bar to mixed marriages, and there have been very few such marriages in that province.

The sentiment of the people of the two late Republics upon the matter undoubtedly has extended and is extending, in an increasing degree, to the large majority of those in the other provinces; and though the question is full of difficulties, particularly in the Cape Province, it seems very unlikely that any Bill which permitted further mixed marriages in any part of the Union would pass through the Union Parliament.

Illicit Intercourse.—It is necessary now to refer to the legislation of each province for the prevention and punishment of illicit sexual intercourse between native or coloured male persons and white women. All such legislation has been passed since the South African War, and the differences in the point of view of the Cape and the Transvaal in relation to matrimonial mixed unions described above are again illustrated in the legislation as to such illicit sexual intercourse.

In the Cape Province, by Act No. 36 of 1902, sect. 34, it is unlawful for a white woman voluntarily to have sexual intercourse *for purposes of gain* with an aboriginal native. The maximum punishment for both offenders is a maximum of two years' imprisonment with hard labour. The procuring of white women for sexual intercourse with aboriginal natives is punishable by imprisonment with hard labour for five years and by twenty-five lashes. A similar punishment may be imposed upon brothel keepers who knowingly permit such intercourse.

The Crown Colony legislature of the *Orange Free State*, in 1903, enacted legislation in identical terms to those of the Cape Act of the previous year.

In the Transvaal, on the other hand, the Crown Colony legislature in the same year declared it (1) an offence punishable by five years' imprisonment for a white woman voluntarily to have unlawful carnal connection with any native (a term which is defined as including any person manifestly belonging to any of the coloured or native races of Africa, Asia, America, or St. Helena); or to incite, solicit, or importune such a native to such an act; (2) an offence for a native (as so defined) to have, or to attempt to have, unlawful carnal connection with a white woman in circumstances which do not amount to rape; such an offence is punishable with six years' imprisonment and twenty-four lashes also; (3) an offence for any person to procure any white woman for the above-described purpose; such an offence of procuring is punishable with ten years' imprisonment and, if committed by a male, by twenty-four lashes also; (4) an offence for an owner of premises to permit the same to be used for any such act as aforesaid; this offence is punishable with five years' imprisonment.

Natal.—In the same year (1903) the Natal Parliament declared to be unlawful any illicit sexual intercourse between a white woman and a coloured person. A coloured person is defined as including "any Hottentot, Bushman, coolie, or lascar, or any of the people commonly called Kaffirs." Each party to the offence is punishable with two years' imprisonment, and in addition the Court may order twenty-five lashes to be inflicted on the male.

Procuring and permitting the use of premises for the offence is punishable to the same extent as in the Cape.

It is a relief to turn from these provisions to some illustrations of questions which have arisen in Natal from mixed unions of black and white. Aboriginal natives in that province have since early days been subject to a special code of laws based on native customs. Among these is the comprehensive Natal native code prepared by a board appointed under Law 26 of 1887, and legalised by Law 19 of 1881. Law 28 of 1865 (which recited that the system or body of law commonly called the Native law is, except in so far as it is repugnant to the general principles of humanity, in force in Natal as regards all transactions arising between natives) provided that natives, including unmarried females, might obtain letters of exemption from those laws; though they cannot be exempted from the laws which prohibit the supply of liquor to natives. An exempted native who has contracted a valid marriage must not, if the marriage ceases to subsist, remarry under native law, custom, or usage. In a case before the Natal Courts some twelve years ago, the son by the first wife of a European married to a native woman by native custom was

held himself to be a native for the purpose of the liquor law. This son was the issue of the first of several polygamous marriages of his father, who, of British descent and nationality, had before the Zulu War gone to live amongst the Zulus and become one of them. The son had been baptised according to Christian rites, had been educated in England, and had married a European wife by Christian rites. His children were also so baptised. The son was, nevertheless, held to be native for liquor-law purposes. In the criminal appeal he was on the horns of a dilemma. Either his father became a Zulu by expatriation, or he did not. If he did, then he himself was a Zulu; if his father did not become a Zulu, but remained a Briton and a British subject, then, his marriage being a polygamous one and not recognised by European law, the son was the child only of his mother, a Zulu, and was therefore himself a Zulu. It has also been held that the marriage of a Basuto woman to a French Creole from Mauritius did not alter her status as a native woman for the purposes of the liquor law.

More interesting is a recent Natal decision. A woman who was the illegitimate daughter of a native woman by a European died, having made a will. Without having been exempted under the law of 1865 from the operation of native law, she had been married according to Christian rites to a European. If she was a native she was unable to make a valid will unless she complied with certain formalities prescribed by the Natives' (Wills) Act, 1895. Her will was not made in accordance with those formalities. The question was whether under the circumstances her will was a valid one. Assuming that she was originally a native owing to her birth, could she, notwithstanding, cease to be a native owing to her marriage? The Court held that, even if she were a native by birth, she was nevertheless released from the operation of native law by the fact of her marriage to a European, notwithstanding she had not obtained letters of exemption under the law of 1865; for her European husband was domiciled in Natal, and by the Charter of Natal, he, being a European domiciled therein, became subject to Roman-Dutch law. Apart from questions of race, no doubt the ordinary rule of law is that by marriage a wife takes the status of her husband, and she becomes subject to the law of his domicile at the time of the marriage. But this case did not fall necessarily within that rule in that the law of the husband's domicile—viz. the Roman-Dutch law of South Africa—comprised two distinct and mutually exclusive systems of law, one affecting domiciled Europeans, and the other affecting natives. It was argued, therefore, that the wife came under no different law by reason of her marriage than the law which governed her before it—viz. native law and custom. But the Court took the view that the law applicable where before marriage the spouses have been subject to different systems of law, because they have different domiciles, is equally applicable where

they have been subject to different systems of law within the same domicile. Therefore the wife became, by her marriage, subject to that system of law of the domicile which governed the husband. The rights and obligations of the testatrix fell then to be determined by Roman-Dutch law, and not by native law, and as the Native (Wills) Act applies only to persons subject to native law, it did not apply to her when she made a will, and her will therefore was valid. A contrary view would have led to strange results in other cases as regards proprietary and personal rights during the subsistence of the marriage.

With these few exceptions, however, no questions of any difficulty arise in any part of the Union owing to mixed marriages. And the reason that there are no such questions has been indicated. In the Transvaal and the Free State the mixed union hardly exists, and where it exists the offspring is not regarded as a white person. In the Cape, where it exists, the policy has been to treat the offspring of mixed unions as white persons for all purposes. It is owing to the existence of two different systems of law, applicable respectively to Europeans and natives, that any questions have arisen as to the offspring of mixed unions.

THE ENFORCEMENT OF AMERICAN JUDGMENTS ABROAD.

[*Contributed to the "Yale Law Journal"* [1] *by* PROFESSOR ERNEST G. LORENZEN.]

As one studies the rules of the conflict of laws of the different countries, one is struck by the fact that most countries assume a fundamentally different attitude in the enforcement of foreign judgments from what they do with respect to foreign laws in general. Although there are various theories concerning the ultimate legal basis upon which the recognition and enforcement of foreign laws rest, there is agreement on the point that under modern conditions a State is in duty bound to determine the consequences of legal acts, under certain circumstances, in accordance with the law of some foreign State. Notwithstanding many differences in detail, there exists to-day a striking similarity in the rules governing the conflict of laws in the various countries. An examination of the law governing the recognition and enforcement of foreign judgments in the different countries reveals, however, the surprising fact that there are, so far as this subject is concerned, no principles which have so far met with anything like universal approval.

This difference in the enforcement of foreign laws and foreign judgments

[1] The article has been slightly abridged, and the valuable footnotes omitted throughout.

arises from a deep-rooted distrust in the administration of justice in other countries, and the fear arising therefrom that irreparable injury may be done to an individual. The laws of foreign countries apply, with few exceptions, with equal force to citizens and foreigners alike. In the case of foreign judgments it is felt, on the other hand, that the Courts of certain countries, because of the incompetency, the lack of independence and partiality of their judges, do not afford sufficient guarantees of an even-handed and enlightened administration of justice. In many countries the view prevails that the enforcement and recognition of foreign judgments can be established only through International Conventions between countries that have confidence in each other's Courts. Thus far very little has been accomplished, however, by this means. Through the initiative of the Dutch Government in 1874 and of the Italian Government in 1881, efforts were made to have the subject-matter under discussion regulated by an International Convention, but these steps led to no practical results. Even at the time of the holding of the Conferences of The Hague in 1893, 1894, 1900, and 1904, which dealt with various topics in the conflict of laws, the time was not deemed ripe for an international agreement with respect to the enforcement of foreign judgments. The only international regulation on the general subject relates to the enforcement of costs, which is found in Art. 16 of the International Convention on Civil Procedure, signed at The Hague on November 14, 1896, and modified by the Convention of July 17, 1905.

Greater progress in this direction has been made by some of the South American countries, which at the Congress of Montevideo, in 1889, agreed upon the conditions under which the judgments of the States ratifying the Convention should be enforced.

Much dispute exists in the different countries concerning the question whether the principles governing the enforcement of foreign judgments should be applied also when foreign judgments are set up by way of defence to a new action. In support of a radical distinction between the principles applicable to the enforcement of foreign judgments and their recognition in *res judicata*, it is contended that the execution of judgments involves a direct act of sovereignty which should be allowed only after an examination of the fairness and justice of the foreign decision by the Courts of the State in which execution is sought. With respect to the recognition of foreign judgments as *res judicata*, it is maintained, however, by some writers, following in the footsteps of Roman law, that a judgment is in the nature of a contract or quasi-contract, and that the obligation arising therefrom must, or should, be recognised upon the same footing as any other obligation when the judgment is pleaded in bar to another suit upon the same cause of action. By submitting the case to the foreign Court the parties are deemed, according to this view,

to have made an implied agreement that they will abide by the decision of the Court. The obligation arising from the judgment is referred, therefore, to the will of the parties rather than being derived directly from the sovereign power of the foreign State. Others deny the contract or quasi-contract theory, but support a similar distinction between the enforcement of foreign judgments and their recognition as *res judicata* on some general theory concerning the conflict of laws.

Foreign judgments may relate to a great variety of subjects. The judgment in question may be—to give only a few illustrations—a divorce decree, a judgment determining the capacity of a party to enter into a contract, a bankruptcy decree, a decision of a Prize Court, or a judgment for the payment of money. With respect to many of these subjects there are great differences of policy; with respect to others the internal law of the various countries is more nearly alike, the similarity being closest in the law of obligations.

(1) *Anglo-American System.*—According to English law a foreign judgment is never enforced as such. Execution will issue only on a domestic judgment. A foreign judgment for the payment of money is accepted, however, as evidence of the creation of an obligation which can be enforced by means of a new suit on the judgment. A similar system appears to prevail in Denmark. The proceedings in England are of a summary character, and a new judgment may be obtained within ten days or two weeks.

(2) *Continental System.*—In most of the Continental and South American countries execution will issue on the foreign judgment as such, but only after leave to do so has been obtained from the local Government. In some of the Swiss cantons the preliminary or *exequatur* proceeding is a governmental or administrative one, but in most countries it has a judicial character. In some countries, for example Germany, a formal action is necessary which the defendant may drag out for months by the interposition of all kinds of defences. Before the judgment of execution can be granted, a local creditor may have attached the property of the defendant, or the defendant himself may have secreted the property. A better system prevails in other countries, in Austria for example, where the foreign judgment is declared subject to execution upon the plaintiff's petition, after an examination by the Court of the question whether the foreign judgment satisfies the requirements of the Austrian law for the enforcement of foreign judgments. The defendant is not informed of the proceeding until after the *exequatur* is granted and the judgment has become a lien upon his property. If he has any defences he is allowed to interpose them before execution is issued. The proceeding is swift in its operation and entails little expense.

Regarding the question whether foreign judgments will be *enforced* there are the following systems:

(1) **Countries declining to enforce Foreign Judgments in the Absence of Treaty.**—In certain countries no foreign judgment will be enforced in the absence of a treaty or International Convention. To this group belong Finland, Haiti, Holland, Japan, Russia, Santo Domingo, Servia, and probably also the Swiss cantons of Basel-Country, Neuchâtel, and Unterwalden (Obwalden). In Norway and Sweden the practice of the Courts is not so clear, but it seems that in these countries also foreign judgments will not be enforced in the absence of treaty.

As no treaties relating to the subject have been entered into between the United States and any foreign Government, American judgments cannot be enforced in the above countries or cantons. A new suit upon the original cause of action must therefore be brought.

In certain of the countries belonging to this group the foreign judgment may be received as evidence of the original obligation.

(2) **Countries declining to enforce Foreign Judgments if the Plaintiff or Defendant is a Subject of such Country.**—In Turkey foreign judgments were enforceable before the war in suits between foreigners, but judgments to which a Turk was a party were not. A judgment rendered in a suit between subjects of the same country, other than Turkey, could be enforced directly by the consul of such country, except as against realty, with respect to which the co-operation of the Ottoman authorities was necessary. If the parties had different nationalities, and neither of them was a Turk, the judgment would be enforced by a consul of the country to which the defendant belonged. Such consul would apply the rules relating to the enforcement of foreign judgments governing in his country.

(3) **Countries enforcing Foreign Judgments without the Requirement of Reciprocity**—(*a*) *The Italian System.*—Of all the foreign countries enforcing foreign judgments as such, Italy has had the distinction for many years of having adopted the most liberal policy. According to this system the *status* of the foreign judgment is fixed once for all. The review of the judgment relates only to certain points which have no reference to the correctness of the decision. Before the foreign judgment is enforced a preliminary proceeding takes place (*giudizio di delibazione*) whose object it is to ascertain whether the judgment was rendered by a court of competent jurisdiction, whether the defendant had due notice of the original proceeding, whether he appeared or was duly defaulted, and whether the enforcement of the foreign judgment would be contrary to the public policy of Italy. If the judgment satisfies these requirements, the justice or injustice of the plaintiff's claim will not be reviewed.

The above system is derived from the principle of the equality of all States, and rests upon the fundamental assumption that the judgments of other States are entitled to full trust and confidence. As in the case of domestic judgments, a foreign judgment, so far as its merits are con-

cerned, imports absolute verity—an irrebuttable presumption being created in favour of its fairness and inherent justice.

In adopting the above principle Italy expected that other countries would follow her example. Having been disappointed in her expectations, Italy has now restricted somewhat her former liberal policy by a decree of July 30, 1919. According to this decree the merits of the foreign judgment may be inquired into in the following cases: (1) Where the judgment is by default; (2) where the judgment has been obtained through the plaintiff's fraud; (3) where the judgment is based upon legal documents which have been recognised or pronounced to be forgeries since the judgment was rendered, or prior to that time, if the defendant was ignorant of such fact; (4) where a document of a conclusive character has been found subsequent to the trial which could not be produced at the trial owing to the plaintiff's conduct; (5) where the judgment was rendered under a mistake of fact resulting from the record or documents of the case. Such an error is deemed to exist if the decision was based upon a supposition of fact, the falsity of which has since been established beyond a doubt, or if the non-existence of a fact was assumed, the existence of which has been positively established, provided that in either case the fact was not a point in issue and thus determined in the case.

The only countries that have followed the Italian policy are: Brazil, Portugal, San Marino, and the Swiss cantons of Basel-City and Tessin. Costa Rica also belongs to this group, the enforcement of foreign judgments being there restricted to those based on personal actions.

With respect to these countries there can be no doubt that American judgments for the payment of money can be enforced.

(*b*) *The French System.*—Under the Ordinance of 1629 the French Courts would enforce foreign judgments obtained by Frenchmen without a review of the merits. No effect would be given, however, to foreign judgments against a Frenchman. As against them a new suit would have to be brought on the original cause of action. According to Maleville the law was not changed by the Code Napoléon, but this view is now generally abandoned. The system actually prevailing is one which reviews the merits of the case (*révision au fond*). It does not content itself with inquiring into the jurisdiction of the foreign Court, the regularity of the service of the summons, appearance or default, and the public policy of the State in which the proceeding for the enforcement of the foreign judgment is brought; but examines the merits of the decision itself. The French doctrine rests upon an assumption diametrically opposed to that underlying the Italian system, and emphasises the fact that, while the different States of the civilised world are in theory equal and entitled to the same respect, their Courts do not actually inspire the same degree of confidence in regard to their decisions. It takes notice of the fact that the judges of certain countries are less competent

han those of others, and are sometimes not free from bias against de-endants belonging to a foreign country. Under these circumstances it s felt to be the duty of a State, before allowing the execution of foreign udgments within its territory, to ascertain whether the foreign judgment vas fair and just.

Some of the French writers and decisions appear to favour the system f integral revision, according to which new issues may be raised, new roofs offered, and a different judgment rendered. Others hold that the ight of revision on the part of French Courts, called upon to enforce oreign judgments, is more restricted, and support, therefore, the doctrine f limited revision. Some of these hold that the power possessed by the French Court is that of a Court of Appeal. According to Pillet, foreign udgments will be enforced in France unless a gross error has been com-nitted or their enforcement is incompatible with the most elementary notions of justice.

The French Courts purport to go on the theory that the *exequatur* roceeding involves no substitution of a French judgment for a foreign udgment. They hold, therefore, that no additional amount to that pecified in the foreign judgment can be recovered, not even interest. The *exequatur* may be granted, however, for a smaller amount. Contrary o the great weight of authority, there are a number of decisions which nold that the foreign judgment is conclusive with respect to the merits f the case.

The system of revision is applied in Belgium, Luxemburg, and probably n the Swiss cantons of Freiburg and Geneva, in Egypt and Monaco if eciprocity does not exist, and in Greece if one of the parties is a Greek ubject. In the above countries American judgments for the payment f money are not conclusive, with the qualifications just made, and will ot be enforced without a re-examination of their merits.

(*c*) *The English System.*—The English law, by requiring a suit on the oreign judgment, differs from the other foreign systems in the mode of nforcing foreign judgments for the payment of money. It differs from hem also in that it regards foreign judgments as enforceable on principle, nd imposes upon the defendant the burden of establishing the defences ecognised by law. As regards the conclusive effect of foreign judgments, he English law stands between the French and Italian systems. Ori-inally foreign judgments were regarded as being only *prima facie* evidence f the justice of plaintiff's claim, but since the case of *Godard* v. *Gray* hey are ordinarily conclusive. In this respect the English law has bandoned the viewpoint of the French law and accepted that of Italy efore the decree of July 30, 1919). It does not go so far, however, as oes the former Italian law, for in exceptional cases it will try the merits f the case over again. The law appears to be established in England that oreign judgments may be impeached if procured by false and fraudulent

representations and testimony of the plaintiff, even if the same question of fraud was presented to and decided by the foreign Court. Such fraud may be shown, although it cannot be done without a retrial of the case. The object of such retrial is not, however, to show that the foreign Court came to a wrong conclusion, but that it was fraudulently misled into coming to a wrong conclusion. Courts of equity may enjoin the enforcement of judgments, domestic or foreign, if they have been procured through fraud, accident, mistake, or surprise.

The modern English doctrine has been followed in Canada with some local variations, and in other parts of the British Empire. In Quebec any defence which was or might have been set up in the original action may be pleaded to an action brought upon the judgment rendered out of Canada.

(4) **Countries requiring Reciprocity.**—The great majority of foreign countries do not follow any of the systems so far discussed, but adopt the principle of reciprocity. The countries belonging to this group differ from those belonging to the Italian system in that they do not admit the principle of the conclusive effect of all foreign judgments. Nor do they support the system adopted by the French Courts, which review the merits of the foreign judgment in every case, with the object of ascertaining whether the decision was fair and just. The mere fact that the Courts of a particular country present strong guarantees regarding the inherent justice of their decisions is not sufficient to entitle their judgments to enforcement, nor does the absence of such guarantees in other countries preclude the enforcement of their judgments. The only test applied with respect to the enforceability of the judgments of a particular State is a political one—whether the Courts of such State enforce the judgments of the State in which the question arises.

The following countries belong to the above group: Argentina, Austria, Bosnia-Herzegovina, Bulgaria, Chile, Colombia, Croatia and Slavonia, Cuba, Egypt, Guatemala, Honduras, Hungary, Lichtenstein, Mexico, Monaco, Montenegro, Panama, Paraguay, Peru, Roumania, the Baltic Provinces of Russia, Spain, the Swiss cantons of Aargau, Appenzell (Outer Rhodes), Berne, Grisons, Lucerne, Saint Gall, Schaffhausen, Schwiz, Thurgau, Unterwalden (Nidwalden), Valais, Zug, Zurich, Uruguay, and Venezuela.

The great majority of the above countries, whose law relating to the subject under discussion is statutory, enumerate additional requirements to that of reciprocity, the particulars of which will be discussed hereafter.[1] Some of the Swiss cantons, however—Aargau, Appenzell (Outer Rhodes), Grisons, Lucerne, Saint Gall, Unterwalden (Nidwalden), and Zug—content themselves with mentioning reciprocity as the sole condition for the enforcement of foreign judgments.

[1] They are contained in an appendix to the article in *The Yale Law Journal*.

The requirement of reciprocity raises many intricate and difficult problems. Let us ascertain in the first place what is meant by reciprocity, how it is applied and how it is to be ascertained. A country having this requirement will not, of course, enforce the judgments of a foreign country which does not enforce its judgments. But what is its significance if the foreign law does enforce its judgments? Will an English judgment be enforced by means of a new suit upon the judgment and will the defences be those available in England in such action? Will the merits of a French judgment be examined within the limits established by the French Courts, and will an Italian judgment be examined with respect to the conditions laid down by the Italian Code of Civil Procedure? Or, will the foreign judgment be enforced only if the conditions required by the foreign country for the enforcement of foreign judgments are identical or substantially the same?

Modes of procedure are governed in all countries by the law of the forum, but there is a difference of view as to what matters fall within the purview of this rule. It would seem, however, that the method of enforcing a foreign judgment, whether by suit on the judgment or by some other procedure, should be controlled by the law of the State in which the enforcement is sought.

So far as the conclusiveness of foreign judgments is concerned, some countries give to them the same effect as is given by the Courts of the foreign country to their judgments. If no effect is given, the judgment will, of course, not be enforced. If it is enforced only after re-examination of the merits, such a review will be made likewise. If foreign judgments are conclusive, but must satisfy more stringent requirements, the same conditions will be applied.

In other countries the requirement of reciprocity has a different signification. The Austrian Courts at one time regarded French judgments as conclusive, notwithstanding the fact that the French Courts would enforce Austrian judgments only after a review of their merits. The Court would inquire only whether Austrian judgments were enforced in France, and paid no attention to the conditions under which such enforcement took place. This view has been abandoned, however, and to-day French judgments are enforced in Austria only after an examination of their merits. The laws of Peru and Venezuela expressly provide, on the other hand, that judgments of countries in which the merits of their judgments are reviewed shall not be enforced. The same view will be taken, no doubt, without express legislation to that effect by other countries in which foreign judgments are deemed conclusive if reciprocity exists. In these countries no American judgment for the payment of money can be enforced if it was rendered in a State in which foreign judgments are deemed only *prima facie* evidence. Execution has been denied even to English judgments, notwithstanding the fact that foreign

judgments are regarded as conclusive on principle in England, because the English Courts under exceptional circumstances, especially in connection with the defence of fraud, may inquire into the justice of the foreign decision. In countries taking this view it will be impossible, of course, to enforce American judgments which are rendered in States in which fraud relating to the original cause of action constitutes a defence to an action on a foreign judgment.

A decision of the Imperial Court of Germany of March 26, 1909, has given to the requirement of reciprocity a still wider meaning. The Court was asked to permit the execution of certain California judgments which had been rendered by default against a German insurance company. The application was refused, and the Court based its decision in part on the ground that the Courts of California would not enforce German judgments without inquiring whether the particular German Court rendering the decision had jurisdiction, *according to German law*, over the person and subject-matter. Such a practice, which is contrary to that of the German Courts, the Imperial Court regarded as an examination of the legality of the foreign judgment and equivalent to a review of the merits (*révision au fond*).

The exact meaning and scope of this doctrine it is difficult to determine, but in substance it seems to be that the enforcement of a foreign judgment will be denied if the Courts of the State whose judgment it is sought to enforce, inquire, before giving effect to foreign judgment, whether it conformed to the internal law of such foreign country.

Is it not singular that a German Court should decline to enforce an American judgment because the Courts of the United States go somewhat further than the German Courts into the examination of the jurisdiction of foreign Courts? If the requirement of reciprocity implies that the foreign law shall be the same in all its details, it will not promote the enforcement of foreign judgments, but actually operate in the contrary direction. As long as the Imperial Court adheres to the above view, no American judgment can be enforced in Germany. If the above principles were applied to all cases alike, not even an Italian judgment could have been enforced, notwithstanding the fact that the Italian system constituted the most liberal system on the Continent of Europe.

The position of the Imperial Court has created much adverse comment in Germany itself. Most of the writers are of the opinion that reciprocity should be deemed to exist within the meaning of the German law if the foreign Court does not apply more stringent conditions with respect to the enforcement of foreign judgments than are prescribed by German law. Some of the writers argue with much force that, inasmuch as subdivisions 3 and 4 of s. 328 of the German Code of Civil Procedure require an examination of the legality of foreign judgments to a much wider extent than was permissible under s. 661 of the former code, the German

Courts should show greater liberality in the recognition of the existence of reciprocity with respect to foreign countries than they were justified in doing formerly.

There are still other grounds which may preclude the enforcement of any American judgment for the payment of money in a country having the requirement of reciprocity. One is based on a difference in the mode of enforcing foreign judgments. Reciprocity might be deemed to be non-existing as regards England and the United States, because of the fact that judgments for the payment of money cannot be enforced in these countries by means of an *exequatur* proceeding, but only by a new suit on the foreign judgment. This view has actually been taken by the highest Court of Austria in a decision of July 19, 1865.

The German Imperial Court, in the case above referred to, advanced another ground than the one above-mentioned, to show that reciprocity did not exist with reference to California judgments. The learned Court assumed that the existence of reciprocity at the time of the German proceedings for the enforcement of California judgments would be sufficient—and before that time the California Legislature had passed a law giving to foreign judgments the same effect as was possessed by California judgments. There was no doubt, therefore, that at the time of the proceedings in Germany, the merits of the case could not be reviewed by the Courts of California in a suit upon a German judgment. The Imperial Court observed, however, that the true *status* of foreign judgments in the United States could not be determined solely from the doctrine applied by American Courts of Law, and that it was necessary to take into consideration the powers with respect to judgments possessed by the American Courts of Equity. The conclusion reached was that the power of our Courts of Equity to enjoin the execution of foreign judgments procured by fraud, accident, mistake, or surprise, was farther reaching than the grounds of restitution recognised by s. 580 of the German Code of Civil Procedure, and that a means was afforded thereby to challenge the merits of the judgment itself. Inasmuch as the German Courts are not allowed to make such an examination, reciprocity was deemed not to exist. From this decision it would follow that the judgments of any State of this Union in which the merits of the case may be re-examined under any circumstances, either at law or in equity, will not be enforced in Germany.

The unfamiliarity of foreign countries with the operation of the systems of procedure prevailing in England and the United States may be sufficient in itself to create doubt and uncertainty in the minds of the foreign judges regarding the conclusive effect of foreign judgments in such countries, with the result that plaintiff will fail to establish the existence of reciprocity.

There is a final reason, which has not been advanced as yet by any

foreign Court—the doctrine of non-merger: why countries requiring reciprocity may decline to give effect to American judgments. The long-established rule that a foreign judgment does not operate as a merger of the original cause of action, and that the plaintiff is free, therefore, to elect whether he will sue on the foreign judgment or bring a new suit on the original cause of action, is not yet abandoned in England or in the United States. This doctrine has no longer any rational basis in States regarding foreign judgments as conclusive, and serves only to furnish to the foreign countries requiring reciprocity another argument for holding that reciprocity does not exist.

But for the doctrine of non-merger, and perhaps notwithstanding such doctrine, there would appear to be, upon a reasonable consideration of the matter, no sufficient grounds why judgments of those of our States in which foreign judgments are regarded as conclusive should not be enforced in countries requiring reciprocity. This conclusion was reached also by Wittmaack, Councillor of the German Imperial Court, after a very thorough study of the American law.

So far it has been assumed that the condition of reciprocity existed only in the country which was asked to enforce a foreign judgment, but what if the foreign country has the same requirement? This question has great practical importance with reference to the judgments of our federal Courts, which since *Hilton* v. *Guyot* recognise foreign judgments as conclusive only if reciprocity exists in that regard. Suppose that the State of X says to the State of Y, "I will enforce your judgments if you will enforce mine upon substantially the same conditions." A presents a judgment obtained in the State of Y for enforcement in the State of X. If A must prove that the judgments of the State of X are actually enforced in the State of Y, it is quite likely that he may be unable to produce any actual precedents to that effect. Indeed, if the State of Y should insist upon the same proof when a judgment of the State of X were presented for execution in that State, and there is no reason why it should not, no precedent could be established in either State. In other words, the requirement of reciprocity would land us in a *circulus inextricabilis*, from which circle there is logically no escape. Reciprocity, logically applied, leads to the non-enforcement of the judgments of such States or countries as have the same requirement. This conclusion is not reached, however, in actual practice. The judgments of the State of Y will be enforced in the State of X, notwithstanding the requirement of reciprocity in both States, if the conditions attached to the enforcement of X's judgments in the State of Y are substantially similar to those prescribed by the law of X for the enforcement of Y's judgments. In other words, a presumption is raised in the absence of proof to the contrary, that the judgments of the State of X will be enforced in the State of Y. The only code which has a specific provision on the subject is that of Croatia and

Slavonia, which presumes the existence of reciprocity in the absence of special reasons for doubt. The suggestion has been made that such a presumption can be made only with respect to countries in which the requirement of reciprocity rests upon a statutory foundation, and not where it is established by Court decisions. It would seem, however, that such a distinction cannot be made as regards the judgments of our federal Courts. The requirement of reciprocity is made binding upon all lower federal Courts by the decision of the Supreme Court of the United States in *Hilton* v. *Guyot*, and should be given the same weight as if it had been laid down by an Act of Congress.

According to the law of a considerable number of States, judgments relating to certain classes of cases will not be enforced. Will that fact in itself prevent the enforcement of their judgments for the payment of money in countries requiring reciprocity? The answer appears to be in the negative, for reciprocity in part is deemed sufficient. In such a case the same distinction is drawn between the different classes of cases as is done by the State whose judgment it is sought to enforce. Hence, if there is nothing in the way of the enforcement of foreign money judgments in such State, its judgments for the payment of money will be enforced. Nor is it necessary, it seems, that the foreign Court should enforce the particular kind of judgment under consideration, the requirement of reciprocity being deemed satisfied if judgments of the same character are enforced.

Must reciprocity exist at the time when the judgment was rendered or at the time when the proceedings for its enforcement are brought? The prevailing opinion appears to be that the time when the enforcement is sought should be controlling. Most authors regard the question as one of procedure, which is governed by the law existing at the time the particular proceeding is brought. Where reciprocity is established, however, by legislation specifically intended to meet a particular situation, such legislation may be disregarded.

The requirement of reciprocity is in certain countries not an absolute one. In Monaco, for example, foreign judgments will, in the absence of reciprocity, be enforced after a review of the merits. In the Spanish Code of Civil Procedure there is a provision to the effect that foreign judgments complying with certain prescribed conditions will be enforced if it is not possible to ascertain whether reciprocity exists or not. Chile, Cuba, Honduras, Panama, and Uruguay, will enforce judgments of countries in which their own judgments are given effect, although reciprocity within the meaning of their codes does not exist, provided such judgments satisfy certain specified conditions.

In certain countries (Austria and Bulgaria) the existence of reciprocity *in fact* is not sufficient. In Austria it must have been declared by the Government, and in Bulgaria by the Minister of Justice. Up to the

present time no such declarations have been made in these countries with respect to the United States. In Hungary a declaration on the part of the Minister of Justice regarding the existence of reciprocity with the particular country is binding upon the Courts.

FRAUDULENT AND VOLUNTARY CONVEYANCES OF PROPERTY.

[*Contributed by* M. V. Ramaswamy Iyer, Esq.]

The rigour of the law relating to fraudulent transactions has, in all legal systems of the world, been considered absolutely essential for the proper administration of justice, for otherwise the well-being of a community, which is the main object of every civilised system of jurisprudence, would be imperilled, and justice cast to the winds. The principle upon which the world's law-givers have acted from time immemorial in dealing with fraud has been that innocent persons should not be defrauded or deprived of their proper and legitimate rights. It is with this end in view that law—both ancient and modern—while providing every means for facilitating honest business transactions in the ordinary course of mankind, has always looked askance at any attempt at fraud. The Hindu law, the Mahomedan law, the Roman law, the English Common law and other legal systems are not wanting in effective remedies to check and punish fraud. The writer here proposes to examine by a comparative study the law relating to fraudulent and voluntary conveyances, with special reference to the Hindu and Mahomedan law thereon.

Hindu Law.—In Hindu law, fraud vitiated the entire transaction. Manu—the first Hindu legislator [1]—says: " When the Judge discovers a fraudulent pledge or sale, a fraudulent gift and acceptance, or in whatever other case he detects fraud, let him annul the whole transaction." [2] The principles laid down by Manu and the later Smriti writers as to the elements in a fraudulent alienation may be summed up thus: First, Secrecy; Secondly, Inadequacy of price; Thirdly, Embarrassed circumstances of the alienor. The Hindu law-givers required every sale or other alienation of property to be made " publicly before respectable persons." [3] The reason why this was insisted upon was to discountenance secret dealings between two individuals in fraud of the rights of a third party, who was either the real owner of the property, or whose interests

[1] For a history of the Hindu legislators, see article on " Mortgage in Hindu Law," in the *Law Quarterly Review*, vol. xxxiv., pp. 261 *et seq.*: see also Cole, *Dig.* vol. i., Introduction, pp. xiv.–xxii.

[2] Manu, chap. viii. p. 165 (Sir William Jones's Translation).

[3] Cole, *Dig.*, vol. i., pp. 323, 324, 336–9.

vould be affected directly or indirectly by those dealings. Besides, the ublic nature of the sale or other conveyance of property was deemed—oth by the Smriti writers and their commentators—to obviate the ecessity of testing its genuineness, and the alienor was held blameless if e produced the alienee and proved his innocence.[1] Inadequacy of rice was considered indicative of fraud in the transaction impeached, specially when the alienor happened to be a person of questionable haracter. Brihaspati thus defines a fraudulent purchase as " that which s made at a very low price, in a private apartment . . . or from a man ot known to be honest." [2] Similarly, where a man in embarrassed circumstances alienated his property, the alienation was held void, the eason alleged being that the will of vesting property in the alienee was vanting.[3] On this principle the commentators laid down on the strength f a text of Narada that where a man entrusts his own property to nother for the purpose of deceiving his creditor or the like, saying " It s given to him," the gift is void.[4]

Mahomedan Law.—The Mahomedan Jurists laid down similar rules elating to the validity of dispositions of property in fraud of creditors. According to Abu Haneefa—the founder of the Hanafi school of Mahomedan law—" If a person deeply involved in debt bequeath any legacies, uch bequest is unlawful and of no effect; because debts have a preference to bequests; as the discharge of debts is an absolute duty, whereas equests are gratuitous and voluntary; and that which is most indisensable must first be considered. If, however, the creditors of the eceased relinquish their claims, the bequest is then valid, the obstacle o it being removed, and the legatee being supposed to stand in need of is legacy." [5] Again, a prodigal, and a person in insolvent circumstances, re said to be under an " inhibition " (Hajr).[6] As regards this, there is difference of opinion. Haneefa declares that he shall not be " inibited," and that the acts of the prodigal in respect of his property re valid " although he be one of an extravagant and careless disposition, ho throws away his property on objects on which neither his interest or his inclination is concerned." [7] On the contrary, the Shafei school law maintain that a prodigal is under inhibition, and should be interected from acting with his own property, " as he expends his substance ly, and in a manner repugnant to the dictates of his reason." [8] The octrine of " inhibition " is based upon the view that the acts of persons

[1] Cole, *Dig.*, vol. i., pp. 321, 323, 325, 334.
[2] *Ibid.*, p. 338. [3] *Ibid.*, p. 455. [4] *Ibid.*, p. 455.
[5] *The Hedaya*, vol. iv., p. 475 (Hamilton's Translation).
[6] " Inhibition " means " Interdiction or prevention of action," *Hedaya*, vol. iii. 468.
[7] *The Hedaya*, vol. iii., p. 473 (Hamilton's Translation).
[8] *Ibid.*

of unsound mind or weak intellect, and minors, with respect to their property, arise from an incapacity to understand the nature of what they are doing, and as such should be restrained or interdicted. This doctrine has, as already pointed out, been extended to the act of a prodigal or of a person involved in debt. The reason put forward by the Shafei school is that a prodigal should not be entrusted with the care of his own property.[1] "Inhibition" as regards a person involved in debt is not allowed by the Hanafite school, but according to the two disciples (Abu Yoosuf and Mohummud), the creditors are entitled to petition the *Kazee* [2] or a Court of Justice to restrain the debtor from alienating his property by sale or otherwise. If an order to that effect is granted, all acts of the debtor subsequent to the inhibition are held invalid.[3] So that under Mahomedan law any disposition *inter vivos* of property by a debtor in fraud of his creditors is only voidable, and not void. But voluntary bequests in fraud of creditors are void, unless the creditors had released the testator from his debts.[4]

Roman Law.—The Roman law provided that all alienations of property or other acts of a debtor arising from a dishonest or fraudulent intention to defeat or delay his creditors should be set aside, excepting *bona fide* transfers for value.[5] Voluntary transfers were set aside, whether the transferee was aware of the injury done to creditors or not.[6] As under the Mahomedan law, so in Roman law a volunteer or gratuitous transferee was held not to be affected by the gift to him being defeated, because he suffered no loss thereby, but was only denied a gain to which other persons had a preferential right: "Cui donatum est . . . nec videtur affici injuria is qui ignoravit, cum lucrum extorqueatur non damnum infligatur."[7] Moreover, any indirect dealing of the debtor to the prejudice of his creditors—*e.g.*, by releasing the security of a person who owed him money[8] or by allowing one of several creditors to obtain a collusive judgment against him[9]—was held to be of no effect whatever.

English Common Law.—These principles have been followed in the English Common Law, and form the main groundwork upon which the other legal systems, such as the Scottish law, the Irish law, and the law of the United States have proceeded in dealing with fraudulent conveyance.

Sugden has characterised the Common Law of England as having

[1] *The Hedaya*, vol. iii., p. 474; also *Macn. Prin. of Mahn Law*, pp. 217–8.

[2] A Judge appointed to administer civil and criminal law in towns during the period of the Mahomedan Kings, prior to the advent of the British Government in India. See Wilson's *Glossary*, p. 272.

[3] *Hedaya*, vol. iii., pp. 484–5.

[4] *Ibid.*, vol. iv., p. 475.

[5] *Dig.*, lib. 42, tit. 8, para. 1, ss. 1–2; *Ibid.*, ss. 7–8; Domat's *Civil Law*, bk. 2, tit. 10, s. 1, para. 3.

[6] *Dig.*, lib. 42, tit. 8, para. 6, s. 11.

[7] *Ibid.* [8] *Dig.*, lib. 42, tit. 8, para. 2. [9] *Ibid.*, para. 3, s. 1.

simplicity as its striking feature.[1] The English Common Law, no doubt, punished all attempts to offend "against the order and good morals of society"[2] and abhorred all "covinous" acts. But under that law it was found extremely difficult to deal with all cases of fraud, as the principles of the Common Law were so vague and difficult of practical application, that it was thought necessary to define clearly, by express legislation, the scope and limits of the law relating to fraudulent conveyances. The result was the enactment of the Elizabethan Statutes—13 Eliz. c. 5 and 27 Eliz. c. 4. Prior to these enactments it was declared by Statutes 50 Ed. III. c. 6 and 3 Henry VII. c. 4 that all gifts of goods and chattels intended to defraud creditors were null and void. The Statute 13 Eliz. c. 5 was a distinct improvement upon the earlier Statutes, in that its operation extended to "alienations of all kinds of property real or personal, made with intent to defraud, defeat or delay creditors."[3] The Statute was directed not only against express and intentional fraud upon creditors, but also against "constructive fraud" having the same effect, and producing the same mischief "by abusing their confidence, misleading their judgment, or secretly undermining their interests."[4] The principles of natural justice also demanded that a debtor should not play false to his creditors, but must satisfy their just and proper claims. The curious reader may well ask, "Was there any analogous provision in the Hindu and Mahomedan law?"

The Code of Manu,[5] as already cited, declares any transaction tainted with fraud as being null and void. Narada—a later Smriti writer—says: "What has been given . . . through any fraudulent practice must be considered as ungiven."[6] The commentators on Manu and the later Smriti writers cited instances of fraudulent conveyance of property in fraud of creditors on the strength of texts from the Smritis. Chandeswara, a commentator who lived in the fourteenth century, laid down that a person involved in debt shall not alienate his property for the purpose of deceiving his creditors.[7] A similar injunction as to gifts made by a person in difficulties or afflicted circumstances was laid down by Hemadri[8] in his Chaturvarga Chintamani.[9] The law as regards the payment of debts was very harsh, and

[1] Sugden's *Powers*, 8th edition, p. 1.

[2] Lofft, 385.

[3] The scope of the statute was so wide that its provisions have been applied from time to time by eminent English Judges to almost every kind of transaction resorted to by debtors to the prejudice of their creditors: see also Preamble to the Statute.

[4] Story's *Equity Juris.*, 13th edition, s. 349.

[5] *Supra*, p. 2.

[6] Cole, *Dig.*, vol. i., p. 453.

[7] *Ibid.*, pp. 232, 455.

[8] A commentator who lived in the thirteenth century.

[9] *Bibliotheca Indica, Dána Khanda*, vol. i., pp. 14, 15.

any indirect method to deprive a creditor of his claim was seriously dealt with. Various punishments were meted out to dishonest debtors, and remedies for recovering debts were sufficiently provided for by the Smriti writers.[1]

The Doctrine of Inhibition.—The Mahomedan Jurists resorted to the doctrine of "inhibition" when a person in insolvent circumstances attempted to alienate his property.[2] Besides, as has already been seen, the bequest of an insolvent debtor is of no avail against his debts, because, as *The Hedaya* declares, "debts have a preference to bequests; as the discharge of debts is an absolute duty, whereas bequests are gratuitous and voluntary; and that which is most indispensable must be first considered."[3] To this statement of law may be compared the dictum of Lord Hatherley, in *Freeman* v. *Pope*,[4] as to the principle of 13 Eliz. c. 5, viz., "that persons must be just before they are generous, and that debts must be paid before gifts can be made." The Statute 27 Eliz. c. 4 was a novel departure from the English Common Law. "By the Common Law," as pointed out in *Upton* v. *Basset*,[5] "an estate made by fraud should be avoided only by him who had a former right, title, interest, debt, or demand, as a sale in open market by covin shall not bar a right which is more ancient . . . but he who hath right, title, interest, debt or demand more puisne shall not avoid a gift or estate precedent. . . ." The Statute 27 Eliz. c. 4 alone declared that a subsequent purchaser could avoid a prior voluntary conveyance.

The Hindu law was the same as the Common Law in that respect.

Yajnavalkya says: "In all disputes relating to property the posterior transaction prevails; but in the case of a mortgage, a gift, or a sale, the prior transaction prevails."[6] This rule, it will be seen, savours nothing of fraud, being indicated in the prior or the subsequent transaction. It gives effect to the general rule of law that as between the same parties the later agreement or transaction supersedes the earlier one. An exception is made with regard to successive transfers by mortgage, gift, or sale, of the same property to different persons. In such a case the earlier title preponderates. This is quite in accordance with the principles of the English Common Law. But if we turn to the Mahomedan Jurisprudence, some analogy may be found to the principle underlying Statute 27 Eliz. c. 4. *The Hedaya* states: "If two men claim

[1] *Vide* Cole, *Dig.*, vol. i., chapter on "Payment of Debts and Redress for Non-payment."

[2] *Supra*, pp. 3 and 4.

[3] *The Hedaya*, vol. iv., p. 475 (Hamilton's Translation).

[4] (1870) 5 Ch. App. 538 at p. 540.

[5] 3 Rep. 83*a*. Cited in Twyne's case: also Smith's *Leading Cases*, vol. i. pp. 1 *et seq.*

[6] Yajna, vol. i., chap. ii., v. 23.

particular article, one in virtue of a purchase, and the other in virtue a gift and seisin, and each produce evidence in support of his claim, ithout however mentioning dates, in this case the evidence to the urchase must be admitted in preference; *because purchase is stronger its nature than gift, as it involves a mutual exchange; and also because urchase is in itself a cause of a right of property; whereas the right of roperty in a gift rests upon the acceptance.*" [1] (The italics are mine). But *bona fide* voluntary conveyance accompanied by possession was pro-ected as against a subsequent purchaser for value.[2] This principle of Iahomedan law is in conformity with the provisions of the Voluntary onveyance Act 1893 (56 & 57 Vict. c. 21).

Now, as regards the elements of a fraudulent disposition of property, ecrecy as a mark or badge of fraud in Hindu law requires a detailed onsideration. The Hindu law-givers considered delivery of possession s an essential requisite for the validity of any conveyance.[3] In early Iindu Jurisprudence especially, change of possession from alienor to lienee was necessary to give title. Any retention or continuance of ossession in the alienor invalidated the conveyance, and a subsequent alid conveyance accompanied by possession prevailed. Where, therefore, ecrecy coupled with want of possession was found in any conveyance, raud was inferred as a matter of course, although all the Smriti writers nd their commentators maintained that secrecy alone was a sufficient ıark or badge of the fraudulent nature of the conveyance.[4] On the ontrary, the publicity of an alienation made in the presence of respectable itnesses was deemed in Hindu jurisprudence as a circumstance nega-ving fraud. The Sage Yajnavalkya lays down in the case of a gift: "Let ıe acceptance (of a gift) be public, especially of immovable property, ıd, delivering what may be given and has been promised, let not a wise an resume the donation." [5] Then, again, he says: "Blame is imputable the man who buys not publicly." [6] Narada says: "An open purchaser clear of imputation; but a purchase in secret is a theft." [7] The reader ay well compare these propositions of Hindu law with Sir E. Coke's ggestion in *Twyne's case* [8] as to a gift in satisfaction of a debt: "Let it made in a public manner before the neighbours, and not in private, r secrecy is a mark of fraud. . . . Immediately after the gift take ssession . . . for continuance of possession of the donor is a sign of ust."

[1] *The Hedaya*, vol. iii., p. 109 (Hamilton's Translation).
[2] Amir Ali's *Mahomedan Law*, vol. i., p. 53.
[3] The rule as to necessity for possession in any conveyance of property was idually relaxed in later Hindu jurisprudence. See article on "Mortgage in Hindu w," in *Law Quarterly Review*, vol. xxxiv., pp. 269–71.
[4] Cole, *Dig.*, vol. i., pp. 323, 334, 338, 339.
[5] *Ibid.*, p. 440. [6] *Ibid.*, p. 339. [7] *Ibid.*, p. 324.
[8] 3 R. 81*a*; see also 3 *Com. Dig.* 297; also Lofft, 782–3.

Apart from the strict formalities for the validity of a gift, the rule of the Hindu Law of Gifts is that the donor should *bona fide* have intended to divest his own dominion in the property, and vest it in another so as to give effect to the gift.[1] In the case of a gift made by a person in embarrassed circumstances with a view to deceive his creditors, Hindu law treated such a gift as void on the ground that the vesting of property was not *bona fide* or was meant merely as a cloak without an actual intention to vest—in other words, the will of vesting property was wanting.[2] The Mahomedan law, on the contrary, proceeded upon the principle of Roman law, that a volunteer or gratuitous transferee should be postponed to creditors of the transferor.[3]

This leads to the inquiry whether consideration, however inadequate, for the transfer would, under Hindu law, protect the rights of the transferee to the property transferred. Although inadequacy of consideration was an element of fraud, it must be said that that circumstance alone did not invalidate the transfer. At the most it was presumptive evidence of the transfer being fraudulent, and the presumption could be rebutted by showing that the transfer was made openly before respectable witnesses. Accordingly Jagannatha—a digest writer of the eighteenth century—states that there is no offence in a sale voluntarily made at a low price by an indigent man, with the approbation of great persons, and declares that such is the practice.[4] In other words, the burden of proving the honesty or notoriety of the transfer lay upon the transferee. Likewise, in English case law on the Elizabethan Statutes, though mere inadequacy of consideration is not sufficient to set aside a transfer, the presumption of fraud arising therefrom is a *presumptio juris* which could be rebutted by the transferee proving the *bona fides* of the transfer, especially when the consideration is grossly inadequate.[5]

It is clear, from the above analysis, that transactions having the least semblance of fraud were never countenanced at any period in the history of the Hindu and Mahomedan jurisprudence. So far as Hindu law was concerned, the first law-giver, Manu, has condensed in one significant sentence the whole law relating to fraud and fraudulent alienations. Is it too much, therefore, to venture the suggestion that the principles of the English Common Law and the Elizabethan enactments have been forestalled by the Hindu law-givers several centuries ago?

The laws of Scotland, Ireland, the United States, the Colonies and India remain to be briefly noticed. The Common Law of Scotland has adopted the principles of the Roman Civil Law by setting aside conveyances of property by debtors in fraud of creditors. A Statute of the year

[1] Cole, *Dig.*, vol. i., p. 454.
[2] Cole, *Dig.*, vol. i., p. 455.
[3] *Supra*, p. 5.
[4] Cole, *Dig.*, vol. i., p. 338.
[5] *Strong* v. *Strong*, 18 Beav. 408; *Tennent* v. *Tennents*, L.R. 2, H.L. Sc. 6; also per Sir W. M. James, V.C., in *Bayspoole* v. *Collins*, 18 W.R., 730.

621[1] gives effect to those principles. In Ireland, however, the Elizabethan tatutes have been re-enacted by a Statute 10 Car. 1 Sess. 2, c. 3 of the ear 1634.[2]

The law of the United States of America is also based upon the Elizabethan Statutes, and has been codified by express legislation.[3] There is, owever, one important variation from the provisions of Statute 27 liz. c. 4. The New York Statute which substantially re-enacts 27 Eliz. 4 provides that no voluntary conveyance "shall be deemed fraudulent n favour of a subsequent purchaser who shall have actual or legal notice hereof at the time of his purchase, unless it shall appear that the grantee n such conveyance . . . was privy to the fraud intended."[4] It seems, herefore, to be settled law in the United States that a *bona fide* voluntary conveyance is good against a subsequent purchaser with or without otice.[5] See also the Voluntary Conveyances Act, 1893 (56 & 57 Vict. . 21).

In the Colonial dominions of the British Empire—excluding those in which the general law is not based on the law of England—the Elizabethan tatutes have been adopted as part of the law of the Colony.[6]

In India, the law as to fraudulent transfers is governed by ss. 42 and 3 of the Transfer of Property Act, 1882, which has expressly repealed the tatutes 13 Eliz. c. 5 and 27 Eliz. c. 4.[7] The provisions of the Transfer f Property Act relating to fraudulent alienations are not exhaustive, and ecourse is often had to the principles laid down by English decisions on 3 Eliz. c. 5 and 27 Eliz. c. 4. *Bona fide* transfers, however, are specially xempted by a saving clause in s. 53 of the Act. Besides, the principle of nglish law, that in a fraudulent conveyance the transferee holds the roperty conveyed as a trustee for the benefit of the transferor, is adopted y s. 84 of the Indian Trusts Act, 1882.

[1] 3 Burge, *Col. Law*, 620; 7 *Ency. of Scots Law*, pp. 12–30 as to the scope of the tatute.

[2] May on *Fraud. Conveyances*, p. 2 (3rd edition).

[3] 2 Bigelow on *Fraud*, chap. iii., xx.; 14 *Am. and Eng. Ency. of Law*, 2nd edition p. 223, 462.

[4] *New York Rev. Stats.*, vol. ii., p. 134, chap. vii., tit. 1, s. 2.

[5] Bigelow on *Fraud*, chap. xx., pp. 517–24, 525.

[6] 3 Burge, *Col. Law*, 644; *Law of Colonies*, by Tarring (3rd edition), pp. 4, 6.

[7] S. 2, (d), of the Act, however, provides that "nothing in the second chapter s. 5 to 53) . . . shall be deemed to affect any rule of Hindu, Mahomedan or uddhist Law."

IMPERIAL UNITY AND LEGAL RESEARCH.

By the kind invitation of the Council of the Royal Colonial Institute a meeting was held on December 18, 1919, in connection with the twenty-fifth anniversary of the formation of the Society of Comparative Legislation. The chair was taken by Sir Albert Gray, K.C.B., in the absence of the Home Secretary, the Right Hon. E. Shortt, K.C., M.P., through the death of his brother. The following paper was read by the Hon. Secretary, Mr. C. E. A. Bedwell:

During the war the desire for Imperial unity has developed in all parts of the Empire. As to the methods by which it should find expression in the government of the whole there are many differences of opinion. While this problem is being threshed out, influences are steadily at work to strengthen the bonds of union. Some of them operate so quietly and unostentatiously that they are liable to be overlooked in the consideration of matters which attract more public attention. Among the most noted are the laws which govern us. The average individual hardly realises the extent to which the actions of his daily life are influenced by the laws of the State of which he is a citizen, though D.O.R.A., with its far-reaching regulations, impressed that fact upon many who had not previously realised it. It may be that the impression will remain when the actual enactment is no longer in force.

Uniformity of Judicial Decisions.—With the notable exceptions of India and South Africa, the whole Empire is proud of its heritage, the common law of England, and even they are considerably influenced by it. The development of that common law by the Courts of the Empire moves along the same lines, and there is singularly little divergence in their decisions. The unifying influence of the Privy Council as the supreme appellate tribunal of the Empire is generally recognised, though on more than one occasion public attention has instead been directed to some conflict of opinion; for example, between the High Court of Australia and the Privy Council. But, after reading widely in the decisions of the State Courts as well as the Federal Court of Australia, I have been much impressed with the extent to which the English decisions are followed and treated with the greatest respect, though there is no legal obligation to accept those of the Courts below the Privy

Council. The *English and Empire Digest* of the cases decided in the Courts of the Empire, containing the English decisions by the side of those of the Courts of the Dominions, now in course of publication, will facilitate, and no doubt tend to increase, the adoption by the various Courts of each other's decisions. It may be that in course of time the English Courts will derive assistance from the decisions of the Courts of the Dominions in interpreting Dominion legislation, of which the provisions have been adopted by the Parliament at Westminster.

Similarity of Legislation.—Ten years ago I edited, for the Society of Comparative Legislation, four volumes containing a survey of the legislative enactments of the British Dominions from 1898 to 1907. In an introduction to them Sir John Macdonell observed:

> The history which the various Statute Books summarised in these volumes record seems to be everywhere similar. With much diversity in detail in this mass of legislation, it is surprisingly homogeneous; it has the same aims; it generally adopts the same means. Almost all the Legislatures are making similar experiments, all making similar resolutions . . . the form of legislation is being standardised. I may add (Sir John continued) that the same ethical level is being adopted. . . . There is also much conscious and direct imitation of English models. . . . Any important measure which has been enacted in one part of the Empire is pretty sure to be enacted sooner or later in another.

Year by year, since the Society was founded twenty-five years ago by Sir Courtenay Ilbert, this annual summary of legislation, in which some foreign countries have been included, has been published, oftentimes under great difficulties. The last issue contains a record of the work of more than sixty Legislatures, supplied by more than forty contributors with knowledge of local conditions, including twenty-four Parliamentary draftsmen or law officers. The reviews of legislation for the last ten years show that the movement described by Sir John Macdonell has tended to become more reciprocal. In the inquiries preparatory to the enactment of legislation at Westminster, there is an increasing desire to ascertain what has been done to deal with similar problems in the Dominions. The recent report (Cmd. 422) of the Lord Chancellor's Committee—which inquired into the working of the Office of the Public Trustee, for example—referred to an arrangement in the office of the New Zealand Public Trustee in connection with the investment of capital moneys as being worthy of adoption. On the other hand, the New Zealand Public Trustee would have been very glad to have been as successful as his English colleague in allaying the opposition of the legal profession, which was described by a New Zealand Commission reporting upon the office as "a spirit of hostility."

Need for Research.—While, however, there is a readiness to profit by the experience of other parts of the Empire, and even to inquire into

the laws of other countries, there does not exist any machinery for acquiring the information in a simple and expeditious manner. Lord Haldane's Committee on the Machinery of Government (Cmd. 9230), appointed by the Minister of Reconstruction, came to the conclusion (p. 6):

> that in the sphere of civil government the duty of investigation and thought, as preliminary to action, might with great advantage be more definitely recognised. It appears to us that adequate provision has not been made in the past for the organised acquisition of facts and information, and for the systematic application of thought, as preliminary to the settlement of policy and its subsequent administration.

They recommended accordingly (p. 25):

> That a considerable development of Intelligence work as a clearly differentiated part of the organisation of administrative Departments is required wherever the work of the Department as a whole extends beyond very modest limits, and that whenever the Intelligence work of a Department is placed upon a distinctive footing the following functions should *prima facie* be considered suitable for assignment to the staff engaged upon these duties:
>
> (1) The conduct of special inquiries into, and the preparation of reports upon, matters affecting the business of the Department.
> (2) The care and maintenance of a Departmental Library.
> (3) The continuous study of the methods of administration prevailing in regard to the same subject-matter in other parts of the United Kingdom (where a separate system of administration prevails), in the Empire, and in foreign countries.
> (4) The scrutiny and circulation in the Department of statements of general interest bearing upon the Department's work, whether from particular branches of the Department, from other Departments, from the Press, or from other sources.

Co-ordination of Work.—If these proposals are carried out thoroughly in respect to legal research, but without any co-relation of the activities of the different departments by some central organisation, the result almost inevitably must be that there will be considerable duplication of material, and also, to some extent, of work. These recommendations have, naturally, been followed by some activity in this direction. But no central co-ordination is in operation, and I learn already of two Government departments who are busily engaged in forming collections in the realm of law on almost identical lines. I have no doubt that an authoritative inquiry would reveal further duplication of effort, such as undoubtedly exists in the four Inns of Court. On the other hand, it was possible for the Board of Trade to present to Parliament a short time ago a paper dealing with anti-dumping legislation (Cmd. 265), which stated that no information was available about the operation of Australian and South African Acts on the subject. If there existed some central organisation for legal research, to which the Department could

have turned, Parliament would not have had to publish such a lamentable confession of ignorance; since it appears, from another report which has just been issued, that the information was in the possession of at least one Government department, not to mention such private sources as the library of the Royal Colonial Institute.

Privy Council Committee of Legal Research.—These are merely examples which could be multiplied without difficulty, and serve to show the need for some central body concerned with the organisation of legal research. The Machinery of Government Committee suggested that there is good reason for extending what has been done for scientific and industrial research to other fields in which thinking is required in aid of administration. It is submitted that law is a field particularly suitable for the adoption of some similar arrangement, and that the needs of the time, combined with the necessity for economy, call for action in following a precedent which is generally admitted to have been successful.

In a paper read before the Royal Society of Arts (*Journal of the Royal Society of Arts*, February 21, 1919), the Secretary of the Department, Sir Frank Heath, explained the steps which led to the Constitution of the Committee of Industrial and Scientific Research. It was realised that, if research was to be organised effectively, it must cover not only the whole United Kingdom, but also be able to co-operate with other parts of the Empire. The Lord President of the Privy Council was accordingly selected as the responsible Minister, as the Privy Council is the only Department which has relations with the whole Empire. "Parliament," added Sir Frank Heath, "voted the Minister—or, rather, a Committee of the Privy Council of which he was Chairman—a sum of money to spend on the encouragement and organisation of scientific research—not a fixed sum, but an annual sum susceptible of increase. By an Order-in-Council all proposals for spending money for these purposes stand referred to the permanent Commission, which is called the Advisory Council for Scientific and Industrial Research." To this body of permanent experts who are not Civil Servants is delegated the responsibility of thinking out a policy. They are an integral part of the machine with a permanent staff, who are kept continually informed of departmental activities.

In explaining the *modus operandi* of the Committee, Sir Frank Heath observed, "that it has been possible on more than one occasion to remove overlapping already in existence, and to bring the workers under different Departments into a co-ordinated plan of attack" (p. 202). After three years' experience the Advisory Committee record in their Annual Report (Cmd. 320) that:

> if the organisation of research for public purposes is to be effective and economical, it is necessary to arrange for a central clearing house, which will

be cognisant of the several lines of research undertaken by different Departments of Government, and a central body connected therewith capable of undertaking or organising research, which it is agreed can best be conducted by one agency in the interests of all (p. 13).

On a small scale the summary of legislation to which reference has been made illustrates the value of co-operation. Besides being useful for social reformers and students of current problems, it is a meeting-place for Parliamentary draftsmen who possess a record of each other's solutions of legislative difficulties.

Duties of Committee.—Upon a Committee for Legal Research there would devolve three main duties:

(1) The arrangements for reports upon the legal aspects of any subject under special investigation.

As in the case of the Committee for Scientific Research, it would not necessarily follow that the Committee would conduct the inquiry, but it might (*a*) leave the inquiry wholly to the Department, (*b*) co-operate with it, or (*c*) appoint someone to make the report. It is a common feature of the Reports of Royal Commissions, Parliamentary and Departmental Committees, that they contain particulars of the laws of other parts of the British Empire and foreign countries, and their operation. Many voluntary organisations are also seeking information of a similar character.

The work of the Society of Comparative Legislation is sufficient to show that a central committee would have many opportunities to secure information, and be in touch with workers in all parts of the Empire interested in the particular subject of inquiry in ways which are not open to a Commission or Committee creating, *de novo*, all its machinery for a specific purpose, or even to a particular Government Department. The Society's *Journal* shows the wide range of subjects dealt with by contributors in different parts of the world whose contributions are given voluntarily to its pages. The Society has thus made a beginning in collecting material and establishing relationships in all parts of the Empire upon which a central committee similar to the Committee of Industrial Research could build, and soon be in a position to advise as to the most economical and effective method of acquiring legal information.

Organisation of Material.—(2) The second duty of the Committee would be to organise the supply of material for legal research. The Machinery of Government Committee advocated the creation and maintenance of Departmental Libraries. They would thus perpetuate and accentuate the existing state of affairs. Moreover, as a general rule—there is at least one exception—Government Departments neither possess libraries nor librarians. They only have collections of books. *The*

Times, in its notice upon the death of Sir Augustus Oakes, Librarian of the Foreign Office (August 21, 1919), said, quite accurately, I understand:

> The description of "Librarian" as applied to the holder of the post he occupied is more or less a misnomer, as the work of the Librarian's Department is mainly concerned with the custody of Foreign Office archives, confidential papers and treaties, and with the preparation of memoranda on historical events, international cases, and treaty questions.

If the policy of creating new Departmental Libraries is to be carried out, it should undoubtedly be accompanied by a stocktaking in the form of a combined catalogue of what is already in existence, and that can only be done by a central organisation with authority. An attempt may be made to give just a brief outline of the present position.

Colonial Laws.—Under the regulations of the Colonial Office there are twelve libraries in London receiving all the ordinances of the Colonies not possessing responsible government. They are the House of Lords, House of Commons, Board of Trade, British Museum, Bar Library, Law Society, the four Inns of Court, the Royal Colonial Institute, and the Privy Council. The ordinances sent to each amount to about six hundred per annum. A few arrive in annual volumes, but the majority are sent in twos or threes. They have to be acknowledged, collated—involving quite an amount of correspondence to keep them complete—and indexed —which even on a modest scale takes a substantial amount of time— and all that has to be done twelve times over, not to mention the binding, which at present prices is becoming a serious item of expenditure. As a matter of fact, I believe that there are other libraries besides those mentioned in the Regulations which receive the Ordinances of the Crown Colonies.

Dominion Legislation.—In addition the Dominions supply their Acts gratuitously probably to the majority of the twelve libraries, and some of them, quite reasonably and naturally, have been raising the question whether the number cannot be reduced in the interests of economy. In the interpretation of these statutes the Courts throughout the Empire have delivered many volumes of decisions. If the contents of all these twelve libraries were put together it would not be possible, I believe, to form one collection containing all the statutes and all the reports of the different parts of the British Empire. Under the auspices of the Royal Colonial Institute, I have no doubt that I shall readily obtain assent to the observation that, if that is a correct description of the present position, it is a standing disgrace to the Metropolis of the British Empire.

The Society of Comparative Legislation has from time to time advocated the formation of a Library containing:

> The Acts, the Ordinances, the Codes themselves, the Reported decisions of the Courts, the works of the Textbook writers, commentators, historians,

and jurists, legal pamphlets and reviews (often containing most valuable matter) from all parts of the world, Blue Books, White Books, Yellow Books; in a word, the whole literature of Law, collected together in some conveniently central building, catalogued and made freely accessible to all *bona fide* students.

Twelve years ago, when that description of the desired library was given in the Society's *Journal*, the cost was estimated at £20,000. Now the cost would be at least five times that amount, and then it would probably be incomplete, for it is not merely statutes and reports which are required, but also the supplementary literature, including especially the material for the study of the operation of legislation. For the practical man is not much concerned with law reports, though he takes more interest in the findings of the Courts than he used to do, but he wants to know about the workings of laws. Let me give an example.

Practical Value of Comparative Legislation.—Many of us are concerned with the serious state of the finances of the hospitals, not only in London, but all over the country. In several cases their present incomes are thousands of pounds less than their expenditure. It appears to be inevitable, therefore, that sources of income other than voluntary contributions should be sought, and it would be useful to turn to the experience of the Dominions where State and rate aid are in operation. In either of the twelve libraries to which I have referred, no doubt the statutes can be found, but under the Acts, as a general rule, the Department concerned is required to make a report to the Legislature. Where can a set of those reports be found? The only way available at present, so far as I am aware, is for anyone interested to send inquiries to all the Dominions. No doubt the information will be required for the purposes of an official inquiry, and then it will be duly collected and tabulated in a Parliamentary paper. The direction of a Committee of Legal Research would secure that this material would be available and kept up-to-date, presumably in the Ministry of Health.

The Laws of the United States.—It is beyond my present purpose to suggest the extent to which a Committee of Legal Research would find that the material for the study of the laws of foreign countries is wholly inadequate, but an exception must be made in favour of the United States, since much of the legislation both of this country and the Dominions is influenced by and influences the legislation of the States of America. The Bar Library contains the statutes, and the Inns of Court among them contain a large portion of the Reports, but by no means the whole. It surely is not unreasonable to suggest that this is a matter which, having regard to the present relations of this country with the United States, is entitled to Government attention, and which might properly be dealt with by a Committee of Legal Research organising the collection of material. A small, very small, step has been taken by the Society of Comparative Legislation to form a catalogue of the

existing supply of American law books to be kept for reference in its chambers in the Temple, which are centrally situated within easy access of the main supplies of legal literature. When this is the position in regard to the non-British nation with which our relations are so close that we hesitate to speak of it as a foreign country, it is possible to surmise the extent of the deficiencies in the material for the study of the laws of other countries.

Dissemination of Information.—(3) The third duty of the Committee of Legal Research would be the dissemination of information. In England there are periodicals available where serious matters are treated for the information of the general reader in a way which is not apparent to the same extent in the literature of other countries. But Legal Research is entitled to an organ of its own, and the increasing circulation of the periodical issued by the Society of Comparative Legislation, under the title of *Journal of Comparative Legislation and International Law*, shows that there is a cordial reception waiting for a *Journal of Legal Research*. The membership of the Society includes Government Departments and Libraries in all the Dominions, India and the Crown Colonies, State and University Libraries in the United States, Chambers of Commerce and voluntary organisations at home, besides individual subscribers, by no means confined to the legal profession, in all parts of the world. There are fresh opportunities for such a publication which, while receiving official recognition, would reach a wide and varied circle of readers. The International Labour Office and other organisations connected with the League of Nations will have their own publications concerned with labour problems, but it is obvious that the information in them will need to be disseminated throughout the Empire. Few people outside the immediate circle concerned at the present time know the admirable volumes issued by the Labour Office in Washington. It is of value to have a publication dealing with legal research, and therefore covering a wide range of subjects of common interest, circulating so as to reach those particularly concerned with the making, administration, reform and drafting of laws, besides those interested from a more academic standpoint in legal research.

The Society of Comparative Legislation.—Besides consolidating and developing the work which has been done for a quarter of a century by the Society of Comparative Legislation, a Committee of Legal Research would form a centre to which the Secretariat of the League of Nations might turn for information upon legal matters. It has been suggested that a large library of foreign law will be required in order to provide material for the research required in that connection. That, again, is a large and expensive undertaking which could hardly be attempted at the present time, but it will readily be admitted that the resources of the Empire should be adequately organised to supply what is required for

the work of the Secretariat. At present the only available body to fulfil this function is the Society of Comparative Legislation, though the lack of any kind of assistance from the Home Government places it in the position of attempting to make bricks without straw. With the exception of grants to the total amount of seventy-five guineas from Gray's Inn, the Law Society, Lincoln's Inn, Middle Temple, and the Royal Colonial Institute, it is entirely dependent upon the membership subscription of one guinea, which must primarily be devoted to the publication of the review of legislation and the Society's *Journal*. In connection with the financial aspect of the subject, there is little doubt that a Privy Council Committee of Legal Research would have funds placed at its disposal to further one or other of its objects. The growing membership of the Society of Comparative Legislation in all parts of the world, which is larger now than at any previous period of its history, shows an increasing appreciation of the value of legal research even on the modest scale which has been possible for a purely voluntary organisation.

Conclusion.—I submit, therefore, that the time is opportune for the recommendation of the Machinery of Government Committee to be carried out for the constitution of a Committee of the Privy Council for legal research, whose three primary functions would be (i) to organise legal research work, (ii) to co-ordinate and develop the supply of material for research, and (iii) to disseminate its results. Thus would be aided the making of sound laws for each part of the Empire, and strength would be given to law as one of the great bonds of Imperial Unity and the advancement of the common wealth.

In the discussion which followed the hope was expressed that some definite action would follow upon the lines of the proposals suggested in the paper. Emphasis was laid upon the importance of the study of comparative legislation, not only to lawyers and law-makers, but to all who are interested in the many questions of social reform.

NOTES.

Mr. Manson.—By the death of Mr. Manson, the Committee of the Society have lost a colleague whose work has for many years sustained the Society through difficulties which he always faced cheerfully and with confidence in its ability to surmount them. After being educated at St. Paul's School and Brasenose College, he graduated with honours (Lit. Hum.) in 1872, and was called to the Bar by the Middle Temple in 1878. He took up Chancery work in Lincoln's Inn, and was specially known as an authority on bankruptcy and company law. Besides assisting Sir Francis Palmer with his standard works on the latter subject, Manson was himself the author of much esteemed books on trading companies, debentures, and a general treatise on company law. For twenty years he was responsible for the series of bankruptcy reports bearing his name. But his chief distinction as a legal writer was the literary skill with which he treated even dull subjects. There are many examples in the *Journal* of the Society, which he edited from 1898 to 1917 with Sir John Macdonell. A list of twelve articles stands to his name in the index issued in 1915, and since then he contributed an article on "Children and the Cinematograph." But his gift displayed itself most, perhaps, in the Notes, including the notes on English cases which in recent years he wrote for the *Journal*. As Honorary Secretary of the Society he did much valuable work at a time when the importance of the subject had not been realised to the extent that closer Imperial and international relations have since given to it. "*Builders of our Law*, originally contributed to the *Law Times*, was an example of the strength and weakness of Manson's literary work. It possessed the easy, bright, vivid style which was much appreciated here and on the other side of the Atlantic. A little book which he wrote on dog law possesses the rare distinction of being a legal book with a frontispiece."

"In 1911 Manson was appointed a registrar of the High Court in Bankruptcy, and relinquished other activities in order to devote himself to his work in Court. Nearly three years ago he resigned the Honorary Secretaryship of the Society, and for some time had ceased to take an active part in the work of the School of Economics, of which he was a governor. Manson was a kindly, courteous English gentleman with

large classical and literary knowledge, and many will long remember his loyal and generous friendship."

1, Elm Court.—The building in which the Society has chambers occupies one of the most interesting sites in the Temple. In the days of the Templars, before the lawyers came into residence, there were two Halls. The older and more solid building passed into the possession of the Middle Temple. It was a rectangular structure, of which the west end abutted on Middle Temple Lane, and on the north-west corner now stands 1, Elm Court. When the present magnificent Hall of the Middle Temple was built, in the reign of Elizabeth, permission was given for the old Hall to be converted into chambers. In course of time they fell into decay, and about the middle of the seventeenth century another building took their place. It was almost at the same spot that the great fire broke out in the Temple on January 27, 1679–80, and devastated a large portion of the Middle Temple. A contemporary record states that, for furiousness and shortness of continuance, "it equalled any of former times, especially if we consider what vast substantial buildings it consumed." The rebuilding was undertaken by Dr. Nicholas Barbon, son of Praise God Barebones, who was the originator of fire insurance in this country. One of the principal sufferers was Elias Ashmole, who lost the greater part of the Tradescant Collection. He took chambers in 1682 upon the completion of the present 1, Elm Court, where he was probably within a few feet of his former residence in Pump Court. Included in 1, Elm Court, was a set of benchers' chambers, with the result that the names of several distinguished lawyers are among the tenants of the building. In 1688 Spencer Cowper, younger brother of Lord Chancellor Cowper, took chambers at No. 1. He is, perhaps, better remembered as one of the prisoners in the trial for the murder of Sarah Stout than as a judge.

In the development of English law, sufficient credit is rarely given to the valuable work done by the reporters of the decisions of the judges. Law reporting is regarded as one of the humbler branches of the barrister's work, but there are several instances of its having been done by men of remarkable learning. Thomas Vernon, who became a Bencher of the Middle Temple in 1708, and took chambers at 1, Elm Court, ten years later, was recognised (according to Lord Kenyon) as the ablest man in his profession, whose opinion on intricate points of law successive judges treated with the greatest respect.

A Bencher of another type was Master Charles Worsley, who lived and died in the Middle Temple in 1739, after being for some time at 1, Elm Court, and was buried in St. Paul's Cathedral. He prepared a history of the Inn, which is known as "Master Worsley's Book," and therein may be read his attachment to its ancient traditions and desire to maintain them unimpaired for future generations. While Master Worsley is remembered as historian of the Inn, one of his successors,

John Reeves, is known as the historian of the whole realm of English law.

For seventeen years Mr. (afterwards Sir) John Day occupied the set of chambers in which the work of the Society is carried on, and during that period Lord Finlay was among his pupils, and remained one of his closest friends.

It is hardly necessary to add that members, especially those from across the seas, will be heartily welcome at any time, and inquiries will be gladly received upon any matter which appertains to the objects of the Society.

The Missing.—The September number of the *Revue internationale de la Croix-rouge* contains a valuable account of the efforts made in different countries to trace the missing, and of the arrangements made to wind up their estates and permit the remarriage of their wives.

In France, by a law promulgated on June 25, 1919, the period which, under the civil code, must elapse before a judicial declaration will be made that a person is missing has been reduced to two years in the case of those who disappeared in the course of warlike operations; and the further period of thirty years which had to pass before the title of a successor could become *définitif* has been brought down to five. Provision is made for the possible reappearance of the missing man, and for his wife and issue in the event of her having married again.

In Italy a decree of August 15, 1919, authorises the presumption of death in the case of all who disappeared within the area of military operations, if no news has been received of them for a year since the end of hostilities, or, if they are known to have been prisoners, for two years since the liberation of prisoners. The necessary provision is made for the return of the missing man, and for the remarriage of his wife.

Germany had dealt with the problem at a much earlier date; and under a law of April 18, 1916, not only missing members of the armed forces, but also members of the auxiliary services and interned civilians who had fallen into the hands of the enemy might be presumed to be dead, if nothing had been heard of them for a year. The scope of this law was comprehensive and its provisions detailed.

The summary concludes with a statement of the manner in which the question came before the Court in England, and how probate of a will or letters of administration came to be granted as a general rule after the military papers had been put in evidence in cases where a person had been reported missing on the Western Front seven months previously. A similar procedure was enacted for Scotland by an Act of 1917.

Journal of the Parliaments of the Empire.—It has been decided by the Branch of the Empire Parliamentary Association in Westminster Hall to establish a journal, for circulation primarily amongst members of Parliament of the Empire, and for the purpose of recording, in

summarised form, the proceedings of general interest occurring in the different Parliaments of the Empire. With this end in view, the debates of general interest in the Parliaments of the United Kingdom, Canada, Australian Commonwealth, New Zealand and South Africa will be summarised, and also the Bills of general interest that are brought before the respective Parliaments. By this means it is believed that a member of Parliament in the United Kingdom, or in any of the Dominions concerned, will be able not only to follow what is happening in the other Parliaments and appreciate the points of view of the leaders of the different parties, but also to obtain ideas of legislative proposals, some of which may perhaps not necessarily find their way into the Statute Book. Much interest has been taken in the journal by the Committees of the Empire Parliamentary Association in the different Parliaments of the Dominions, and it is anticipated that the journal will form another valuable link in the scheme of mutual intercourse and exchange of information between Home and Dominion members of Parliament which has been provided by the Empire Parliamentary Association since its formation at the Coronation of H.M. in 1911. It is hoped that the first number of the journal will appear early in 1920. Further particulars may be obtained from the Editor of the *Journal* of the Empire Parliamentary Association, Westminster Hall, Houses of Parliament, S.W.1.

Uniformity of Legislation in Canada.—The second meeting of the Conference of Commissioners on Uniformity of Legislation in Canada accomplished most useful work in completing the draft of a Bill for general adoption dealing with *legitimatio per subsequens matrimonium.* It also devoted sessions to bulk sales, conditional sales, and fire insurance policies. A Committee presented an admirable report on legislative drafting, and another dealt with the laws of sales of goods and partnership. The former are given elsewhere in this number, but on the subject of partnership the Committee reported:

In order to avoid confusion, the Committee points out that there are three phases of the law of partnership, all of which have been the subject of legislation in some of the provinces of Canada.

These three phases of the law of partnership are:

(1) The general law of partnership as codified in the English Partnership Act, 1890. (2) Limited partnerships. (3) The registration of partnerships and of trade names.

By way of illustration the Committee refers to the Revised Statutes of British Columbia, 1911, c. 175, as a statute which includes these three phases of the subject, and deals with them in separate "parts" of the statute.

The Partnership Act, 1890, by which the general law of partnership was codified in England, has been adopted in the following provinces of Canada (as well as in many other parts of the British Dominions):

Alberta, N.W.T. Ord. 1899, c. 7. British Columbia, R.S.B.C. 1911, c. 175, parts 1, 2, and 3. Manitoba, R.S.M. 1913, c. 151, as amended, 1915, c. 51; 1916, c. 82. Nova Scotia, Statutes of 1911, c. 1, as amended, 1916, c. 24. Saskatchewan, R.S.S. 1909, c. 143; amended 1913, c. 67, s. 21.

The English Limited Partnership Act, 1907, has not been adopted in any of the provinces of Canada.

In the following provinces there are statutes relating to limited partnerships, differing in some material respects from the English statute and not based upon it:

Alberta, N.W.T. Ord., 1899, c. 7, ss. 47–66. British Columbia, R.S.B.C. 1911, c. 175, part 3. Manitoba, R.S.M. 1913, c. 151, ss. 61–79. New Brunswick, C.S.N.B. 1903, c. 144, part 1. Nova Scotia, R.S.N.S. 1900, c. 144. Ontario, R.S.O. 1914, c. 138. Saskatchewan, R.S.S. 1909, c. 143, ss. 59–77.

Registration of Partnerships.—There are statutes on this subject in force in the following provinces of Canada:

Alberta, Statutes 1908, c. 5. British Columbia, R.S.B.C. 1911, c. 175, part 4, as amended, 1914, c. 55. Manitoba, R.S.M. 1913, c. 151, ss. 48–60. New Brunswick, C.S.N.B. 1903, c. 144, part 2 as amended 1906, c. 7; 1915, c. 32. Nova Scotia, R.S.N.S. 1900, c. 143. Ontario, R.S.O. 1914, c. 139. Prince Edward Island, Statutes 1876, c. 8. Quebec, R.S.Q. 1909, art. 7437 ff., as amended 1915, c. 72. Saskatchewan, R.S.S. 1909, c. 143, ss. 47–58, as amended 1915, c. 43, s. 23.

Recommendations.—The Committee suggests:

(1) That the Conference recommend—

(*a*) That the Sale of Goods Act, 1893, as enacted in England, be adopted by the legislature of Ontario, with the necessary modifications.

(*b*) That the Factors Act, 1889, as enacted in England, be adopted by the legislatures of Manitoba and Prince Edward Island, with the necessary modifications.

(*c*) That the Partnership Act, 1890, as enacted in England, be adopted by the legislatures of New Brunswick, Ontario, and Prince Edward Island, with the necessary modifications.

(2) That the Conference appoint a committee to compare the English Limited Partnership Act, 1907, and the statutes of the different provinces on the subject of limited partnerships and the registration of partnerships, and to report at the next meeting of the Conference as to the advisability of recommending uniform legislation on these subjects, and, if it should seem advisable, to submit to the Conference model statutes to be considered by the Conference and recommended for adoption by the provincial legislatures.

Profiteering.—Speaking as Chairman of the Central Committee under

the Profiteering Act, Mr. C. A. McCurdy, K.C., M.P., gave the following particulars (*The Times*, September 16, 1919) of the action which has been taken in different countries to deal with profiteering:

The profiteer is one of the minor horrors of war. While some of the minor horrors infest the trenches, the profiteer preys on the civilian population at home. Parasites and profiteers figure in the story of the Napoleonic wars, just as in our own day. Rats followed the Grand Army to Russia, and some of Napoleon's laws against profiteers are still on the statute-books of France. In the war which has just ended, not one of the belligerent countries has escaped the plague of profiteers; and the neutral countries have also suffered. In 1917 Sweden was compelled to make a law against "unreasonable prices in extraordinary circumstances resulting from the War," and even in the last few weeks France, Germany, Italy, and Canada have all found it necessary to make fresh laws and regulations to protect the public against the profiteer. Canada has just passed a new statute making unfair or unreasonable prices illegal, and subjecting offenders to heavy penalties or imprisonment.

In Italy, where profiteering led to riots and the looting of business premises, local committees have been empowered to fix prices for all articles of necessity. There is a price-fixing committee in every town. Their decisions have the effect of law, and the penalties for demanding unauthorised prices include fines, confiscation, and sale at cut prices of the offender's stocks, or the taking over, without compensation, of the offender's business. The French Government have found it necessary to take fresh and active measures. They have created a special anti-profiteering department, they have appointed local price-fixing committees, and a Central Economic Council to deal with prices and profits generally and to prepare schemes for further legislation. They have under consideration a new law, whereby price-raising in food, fuel, or clothing and other essentials may be punished by three years' imprisonment and a fine of 100,000 francs, the loss of all civil rights, exclusion from trade, and deportation for five years from France. If the offence is committed by a speculator, not legitimately engaged in the trade, the penalties are higher. These are much more drastic measures than our Profiteering Act, and I have no doubt the evil is much greater on the Continent than it is here. But it was necessary for us to do something.

Professor Oppenheim.—By the death of Dr. L. F. L. Oppenheim, the science of International Law has suffered a great loss. From his appointment to the London School of Economics in 1895 until his death at Cambridge, amid his work as Whewell Professor, he had ungrudgingly given his powers of research, vision, energy, and enthusiasm to the teaching and study of the Law of Nations.

Besides his early works on criminal law, he published a book on the Panama Canal Conflict, a study of the League of Nations, and a collection of International Incidents. He was joint-author of the chapter on Land Warfare in the *Military Manual*, a frequent contributor to legal

periodicals in England, the United States, France, and pre-war Germany, and editor of a series of monographs on the law of nations and diplomacy. Many books, both in and outside this series, owe their origin and inspiration to his encouragement and advice.

But it was by his *Treatise on International Law*, first published in 1905–6, that he won his way to eminence, and secured an international reputation. The second edition, published in 1912, was soon exhausted by the demands from libraries, Departments of State, lawyers, and students in all countries; and early in the war it became impossible to obtain copies. When he died, he was engaged in the preparation of a third edition, which is being completed by Mr. F. R. Roxburgh, and the mass of material weighed heavily upon him in the last months. The demand for the book sprang from a true appreciation of its merits. Nature had endowed the author with a passion for research and a clear and unbiased judgment. His Continental training and experience made him familiar with many systems of law and procedure and many languages. His capacity for friendship won him admirers in all his places of residence, and he enjoyed and appreciated discussion with men of different callings and other views. "I am a professor," he used to protest playfully, when confronted with the argument of politician or pleader. None the less he understood the alliance of the law of nations with diplomacy, and felt the needs and aims of student, judge, and diplomat alike. Understanding their processes of thought, he knew how to offer them his guidance. He probed the controversies of the day, analysed and quoted the varied literature upon them, and offered for discussion and criticism his own sober and impartial opinion. His readers caught the flame of his devotion to the science of which he was a master. "Ours," he wrote once, "is the faith that removes mountains, for our cause is that of humanity." And so those who enjoyed his friendship will always dwell affectionately upon the memory of happy days spent with him. Those who never knew him will praise his learning.

Library Administration in the United States and England.—In the course of speaking in the discussion at the Royal Colonial Institute upon the paper dealing with Imperial Unity and Legal Research, printed elsewhere in this number, Mr. Newton Crane said:

> So far as a library is concerned there is a feeling in the United States that no library is a library worth consulting unless it has everything, and the librarian would feel himself affronted if he were asked for any reasonable book which he could not supply to the applicant. Every State has its State University. Every State University has its College of Law. Students come from all over the State. The State makes an appropriation for the library. That is true as far as the State is concerned. In those large centres of population, such as Boston, in which is located the Harvard University, or New

York, or Philadelphia, or elsewhere, there are Bar Libraries, and those Bar Libraries are supported by voluntary contributions. No lawyer would consider himself to be a lawyer, or worthy of accepting a brief, unless he were a Member of those Associations and of the particular Association in his area. I was last summer in the library of the Bar Association of New York, a magnificent building erected in the residential club district of the City. I found the man, whom I went to see, engaged in looking up some legal point. He had by his side an electric bell and a speaking-tube or telephone, and then there was a shute which led from the place where most of the books which he wanted were located, and when he made inquiry for a certain book, down the shute came the book on a table by his side. Every possible thing is done that science can devise to assist in the utilisation of the libraries. In that instance, of course, it is voluntary. The best illustration of the absurdity of our present system, I think, occurs in our own Inns of Court here. We have on the Barristers' side in our Inns of Court five libraries. We have the Libraries of Gray's Inn, Lincoln's Inn, The Inner Temple, The Middle Temple, and the Bar Library. Fifteen or eighteen years ago an English Barrister who had a practice in America had the fever of having everything complete, so he supplied himself at his own expense with all the Statute Laws of the United States, and he was also a subscriber to the Sessions Acts. Contemplating removing to London, he offered to the Middle Temple his entire collection upon the one condition that it should be kept up. Unfortunately, it was refused, and the result is that collection has gone to the Bar Library, where it is kept up, and so we have in London all the Statute Laws of the United States. But, unfortunately, the other four libraries are attempting to keep it up, and the result is we have their shelves crowded with a very imperfect collection of the Statutory Laws of the United States. In the same way those libraries are attempting to keep up the Reports of the cases in the United States. It is impossible for them to do it. The result is, each of the four has about the same Reports, and none of them has other Reports which are comparatively necessary, not only for the work of the practising lawyer, but for the persons engaged in social reform of any kind. I do not know whether I shall live long enough to see it, but I hope that some day they will get some sort of system into that collection of books, so that each one of those libraries will take in that which is really of use to them, and that they will divide amongst themselves the housing and gathering in of the Laws of the United States, so that one library will take the Reports, if not of the whole country, of a section of the country, and another library will take the textbooks from the United States, and leave the Bar Library with its present collection. In the same way you have in a larger sense the Statutory Laws of the Colonies here spread over several areas and gathered in certain places. It seems to me useless to go on in that sort of way, when that same expense and the same trouble would give you the whole law.

The Definition and Nature of Law.—*The Columbia Law Review* for November 1919 (vol. xix., No. 5) contains a paper by Mr. Roland R. Foulkes, which is to form the first chapter of a treatise on International Law in course of publication, giving a series of definitions of law. The

result of analysis of them is a definition of law as the jural conception of human conduct as influenced by external factors other than forces of nature. "To criticise this in detail," writes Mr. H. J. Randall, "would go beyond the limits of a note, but it sins against the first canon of definition, viz., that the word defined should not be included in the definition."

The author affirms that no attempt has ever been made to form a jural conception of the influences of such things as geographical conditions upon conduct, because they are facts which are entirely beyond the control of man, and that it is unnecessary for the legal philosopher to burden himself with that investigation. Certainly Bodin and Montesquieu both made the attempt, and there are suggestive observations on the subject in Aristotle. As to the necessity of the study, the present writer can only express the opinion that the application of the principles of modern geographical study to law is one of the most promising fields of research that lie open in the immediate future, and that it is likely to prove the solvent of more than one of the old controversies of the schools.

Effects of the War in Chile.—*The Early Effects of the European War upon the Finance, Commerce and Industry of Chile*, by L. S. Rowe, is one of the first group of similar studies of the ruinous effects of war as exemplified in the recent world conflict, to be published by the Carnegie Endowment for International Peace. This example is one of the most striking imaginable, since it deals with a country which remained neutral throughout, and which is besides one of the most remote of all countries from the scenes of the struggle. Those circumstances, however, have not saved Chile from becoming one of the earliest and most severe sufferers, economically, by the war. The early effects in Chile of the war included such vital results as the shutting down very largely of some Nitrate works, and the carrying on of others by means of State advances of capital, various financial expedients, notably Moratorium Laws and measures to fill up the gap in the national chest caused by the disappearance of the revenue normally yielded by the Nitrate Industry, and which comprised Death Duties and (for the first time in Chilean history) a preliminary form of Income Tax in the form of a reduction of 5 to 15 per cent. on the salaries of Government officials. Had the effects of the war stopped at the stage up to which the present narrative carries the reader, a more unanswerable economic case against war would have been hard to find. No final conclusions can, however, be deduced from the Chile situation until there is published a similar study on the later consequences of the war. Possibly, this may show a heavy balance of enonomic disadvantage to the country, but to judge from general reports received meanwhile, this is more than doubtful. At any rate, some beneficial results of a most enduring kind from the war have meanwhile come to Chile. Long-deferred economics in the manage-

ment of State railways have been made. The Government has ceased to rely so largely on one industry alone (that of Nitrate) for revenue.

Labour has been, perforce, distributed much more equitably amongst other industries, many of which had long been in great need of it, and the war itself has given a fresh impetus to many other industries, in particular those of copper production and copper smelting and numerous agricultural pursuits. For example, Chilean wines may possibly at last find a market abroad, as a consequence of the interruption of wine production in Europe.

The energies of the Chilean nation are, therefore, likely to be much more evenly distributed in future than they have been in the past, when they were apt to be concentrated too much, and often very feverishly, on the one item of Nitrate. On the import side of her trade the consequences of the war may prove no less striking.

War restrictions of exports from foreign countries have naturally tended to make Chile more self-dependent in regard to many commodities formerly imported, but which are now beginning to be produced locally. Very particularly may this be anticipated in future in regard to foodstuffs of the more fancy kinds.

However, this is all more or less matter of conjecture at present, and, as already remarked, we must await the next and final article on the subject before forming conclusive ideas upon the effects in Chile of the war.

Notes on the Legislation of St. Helena.—The Law Officer at St. Helena, Mr. Phillips, writes: "Discovered by the Portuguese in 1502, St. Helena came under British rule in 1651, when it was taken possession of by the East India Company, who in 1661 were granted a charter for its administration. A more extended charter was granted in 1673 by Charles II; and from that time until April 22, 1834, the legislation of the island was, except during Napoleon's captivity, under the control of the Honourable Court of Directors of the East India Company.

"The administration of justice has been carried out under the Statute Laws of England, with the exception of a limited number of local Ordinances and Bye-laws suitable to the condition of the country.

"There has been very little alteration in the form of legislation from the time the island was taken over by the Colonial Government, in 1834, up to the present. In a few instances new Ordinances and Bye-laws have replaced those in operation under the East India Company, and with the abolition of slavery in 1832 several obnoxious Bye-laws were abolished.

"On the whole the legislation of St. Helena has worked satisfactorily, which probably accounts for the non-existence of a local code of laws.

"The marked absence of the more serious class of crime from the criminal Reports, and the fact that there are no lawyers in practice

here, may also account for the absence of local legislation in regard to offences against the State and person.

"It is hoped, however, when the financial condition of the Colony improves, to have a simplified form of criminal Code and Civil procedure.

"The ordinances now in force deal chiefly with the control of the Customs, Education, Firearms, Health, Trial by Jury, Auction, Weights and Measures, Markets, etc., and are framed in accordance with similar laws in force in the United Kingdom.

"The following extract from a letter from the Honourable Court of Directors of the East India Company to the Governor-in-Council, dated February 3, 1762, is of interest as showing the judicial procedure then existing, and which has up to the present but slightly altered or varied:

"We have now maturely considered the subject of several letters from you relative to the administration of justice in St. Helena, and have taken all necessary advice thereon, and we are satisfied that we have a right, by ourselves, our ministers, and officers, to govern the Island of St. Helena, and to hold courts of justice therein for trying all kinds of crimes, offences, and misdemeanours; and also for hearing and determining all civil actions, viz.: between party and party with respect to property, of which our Governor and Council of St. Helena, for the time being, are judges; but all these trials ought to be by juries, consisting of twelve (now eight) men resident within the island; or, if a sufficient number of residents cannot be had, then the juries may be made up of Englishmen happening to be there, and the convictions, punishments, and determinations, must be according to the known laws and statutes of this realm, or as near thereto as the nature and circumstances of the case will admit of; and great care must be taken in criminal cases not to inflict heavier or different punishments than the law prescribes.

"As our Governor and Council of St. Helena have all along acted as judges and magistrates, we think it right they should continue to do; and we do not conceive it to be necessary to grant any authority for this purpose, other than that which has been usual to their constitution.

"Notwithstanding we have said that all determinations must be according to the Laws of England, yet we would not be understood thereby to mean that you shall not put in execution such local laws as have been all along subsisting and put in practice for better Government of the Island; we mean laws which relate as well to civil and criminal matters, such as are not repugnant to the laws or statutes of this realm.

Periods of Sessions.

"The first Wednesday after the anniversary of St. Thomas, 6th day of January (now called Epiphany).

"The second Wednesday after Easter.

"The first Wednesday after July 7.

"The first Wednesday after Michaelmas."

Bird Sanctuaries.—Apropos of the article contributed to this number on the subject of the protection of wild birds, note may be made of a recent arrangement effected in Canada as recorded in the following paragraph from *The Times* (August 26, 1919) :

The Dominion Government is organising co-operation with the Government of the United States to carry out effectively the treaty passed a few years ago for the protection, in both countries, of nearly all the beneficial migratory birds. Most of the provinces have now amended their game laws in such a way as to bring them into harmony with the terms of the treaty, and to provide machinery for making them effective. The maritime provinces have not yet modified their laws, but have appointed a staff of wardens to enforce the existing laws and to educate the public.

Twenty-eight places in the West, suggested as breeding sanctuaries, have been inspected. The Dominion has made Point Pelee—the most important bird area in Ontario—into a Dominion Park, in order that it may be maintained as a bird sanctuary, and sanctuaries have also been established at Bird Rocks, Bonaventure, and Pierce Rock, in the Province of Quebec. The Department of the Interior has appointed and delegated authority to an Advisory Board of Wild Life. The new Board recently held a national conference on wild life protection at Ottawa, with the object of bringing together everyone in the Dominion who was concerned in the protection of the wild life of the country, and of exchanging information and ideas on the subject.

Public Holidays.—The Guaranty Trust Co. of New York have issued a new edition of an interesting book showing the Bank and Public Holidays throughout the world. It is observed that for several years there has been a steadily increasing tendency to suppress all minor holidays, such as purely religious festivals, and confine the legal observation of holidays to dates of national importance. The book is arranged in double form. The first list accords with the calendar and shows the holidays according to their dates. The second is arranged according to the countries. There are many notes containing supplementary information. Perhaps it is too much to ask for the inclusion of the legislative enactment authorising the holidays, but no doubt many would find it useful.

Bihar and Orissa Code.—" The Province of ' Bihar and Orissa ' in India," writes Mr. C. E. Buckland, " dates only from April 1, 1912, when certain territorial readjustments were effected in consequence of the announcement made by His Majesty King George V at Delhi in December 1911. All the districts then assigned to the new Province thus constituted used to be included in Lower Bengal, as it was previous to its Partition in 1905. This fact accounts for a large amount of law which was in force in Lower Bengal being still in force in ' Bihar and Orissa " ; and very properly the first edition of the Bihar and Orissa

Code[1] which has just been published follows the arrangement of the Bengal Code. Thus, the first volume contains the Bengal Regulations from 1793, certain Local Acts, Regulations under the Parliamentary Statute of 1870, and four General Acts. Volumes II and III contain the Bengal Acts of fifty years, 1862 to 1912, with the exception of Acts not applicable to the new Province. When this was constituted, it was equipped with both Executive and Legislative Councils: the Acts of the Local Legislature passed in 1912–16 are in Volume III. (This edition, just received, was published in 1917.) Volume IV contains a quantity of miscellaneous matter, all helpful to show the law in force in any part of the new province, including the 'scheduled districts' and 'de-regulationised tracts' thereof. The Chronological Tables and full Index will facilitate the use of the Code in the hands of officials and legal practitioners. This Code, like other Provincial Codes, does not purport to contain the Code of Acts of the Governor-General's Council which apply to all India. In the two Codes taken together the whole law applicable to 'Bihar and Orissa' is fully set out."

[1] *The Bihar and Orissa Code*, in four volumes: containing the Regulations and Local Acts in force in the Province of Bihar and Orissa. First edition, edited by W. S. Coutts, I.C.S. Calcutta, Superintendent Government Printing, India, 1917.

PUBLICATIONS RECEIVED.

The receipt of the following publications is acknowledged with thanks:

Economic Effects of the War upon Women and Children in Great Britain (Preliminary Economic Studies of the War, published by the Carnegie Endowment for International Peace). (Oxford University Press, 4*s.* 6*d.*)

Broken Homes. A Study of Family Desertion and its Social Treatment. By Joanna C. Colcord, Superintendent of the C.O.S. of the City of New York. (New York: Russell Sage Foundation, 75 cents.)

Financial History of Great Britain, 1914–1918. By F. L. McVey. (Oxford University Press, 4*s.* 6*d.*)

Provisional Draft of a Licensing Bill framed by the Licensed Trade of England and Wales, on the Principles of which the Various Sections are in Agreement. (Butterworth & Co.)

The Relation of Custom to Law. By Gilbert T. Sadler, M.A., LL.B. (London: Sweet & Maxwell, 7*s.* 6*d.*)

NOTICES OF BOOKS.

THE RENOVATION OF INTERNATIONAL LAW.[1]

ANY work from the pen of a jurist so eminent as Dr. Jitta, the President for the present year of the International Law Association, will doubtless obtain the sympathetic reception that it deserves. As may be inferred from the title, its chief claim to originality arises from the method of treatment. The work was written during the war, and most readers will perhaps be struck by the peculiarity that it does not refer to the League of Nations. The Author explains that the ground of this omission is that the project of the League was only developed after the Armistice, but as a matter of fact the actual negotiations were only the result of the thought of many of the leading minds in most countries during the greater part of the war.

Dr. Jitta's main thesis is that mankind is a juridical community *de facto*, and that international law consists of the reasonable principles of international social life adopted by such a community. The result of this way of looking at the matter is that the law of war is expelled from its place in the system of international law, but, on the other hand, both public and private international law come within the same system. The other fundamental principle that the Law of Nations is based upon the relations between States likewise falls to the ground. The Author is not afraid of carrying his principles to their logical conclusion, even though he is " fully aware of the fact that positive law is not in accordance with the principles." He therefore treats the sovereignty of the State as a power derived from mankind, to whom " the paramount power in the juridical community of the human species belongs." One must express a doubt whether there is any great advantage to be gained from such a complete invasion of accepted principles. Historically it is admittedly untrue, and historical falsehood is not a particularly sound foundation for theoretical accuracy. We know as a fact that no State ever came into existence as the delegate of mankind, and no Government has ever regarded itself as acting under an authority so derived. If in the future, under the League of Nations, or otherwise, anything in the shape of an international authority should come into

[1] *The Renovation of International Law, on the Basis of a Juridical Community of Mankind.* By Prof. Dr. D. Josephus Jitta. 1919. The Hague: M. Nijhoff.

existence, it will be formed by a continuance and development of the historical process, and not in direct opposition to it. The international authority will derive its powers from the consent of the constituent States; it will never be a power seeking to impose its authority upon the States. At any rate, this is the view that a writer trained in the traditions of the common law and in the principles of British constitutionalism would naturally take. Possibly Dr. Jitta's opposing opinion may be explained as the result of a different environment. He is the citizen of a country in which there was a full reception of the Roman Law. The Roman Law remains the sole example of anything approaching a world-wide system, as the world was known in ancient times, and it was a system imposed by a higher power which derived its title from conquest. Now that the German danger has been removed, that source of power will not be admitted, and the consent of the constituent States must remain as the sole title of any international authority.

Apart from the theoretical first principles, the book is in detail a very interesting example of a species of composition that used to be commoner than it is at present. It is an attempt to work out over a large sphere the principles of the law of reason, or national law, or the greatest happiness principle, or the rights of man, or whatever other name may be adopted from time to time. All works of this kind have the interest that attaches to attempts to work out details from first principles, and all suffer from an almost unavoidable defect. Authors who maintain a rigid logical principle are apt to brush aside the principles of geographical distribution, and the very real distinctions between the peoples, races, and languages of mankind. From their point of view these differences are only so much "fiction." Also the principles of reason in the hands of such a writer are apt to bear a very close and perfectly intelligible relation to the writer's own opinions, and to be able to set forth one's own opinions as the world-wide law of reason must give much the same satisfaction as the old Calvinists derived from regarding themselves as the predestined elect of God. Nevertheless the affairs of men have never yet been conducted upon any single logical principle, and it is perfectly safe to prophesy that they never will be.

H. J. R.

JUDICIAL CONTROVERSIES BETWEEN STATES OF THE AMERICAN UNION.

Dr. Brown Scott's[1] collection of cases dealing with controversies between the States of the United States will be of great service to students of Comparative Jurisprudence. The jurisdiction of the U.S.

[1] *Cases decided in the Supreme Court of the United States.* Collected and Edited by James Brown Scott, A.M., J.U.D., LL.D.

Supreme Court, as shown by these cases, is of international interest. C. J. Fuller, describing it, says:

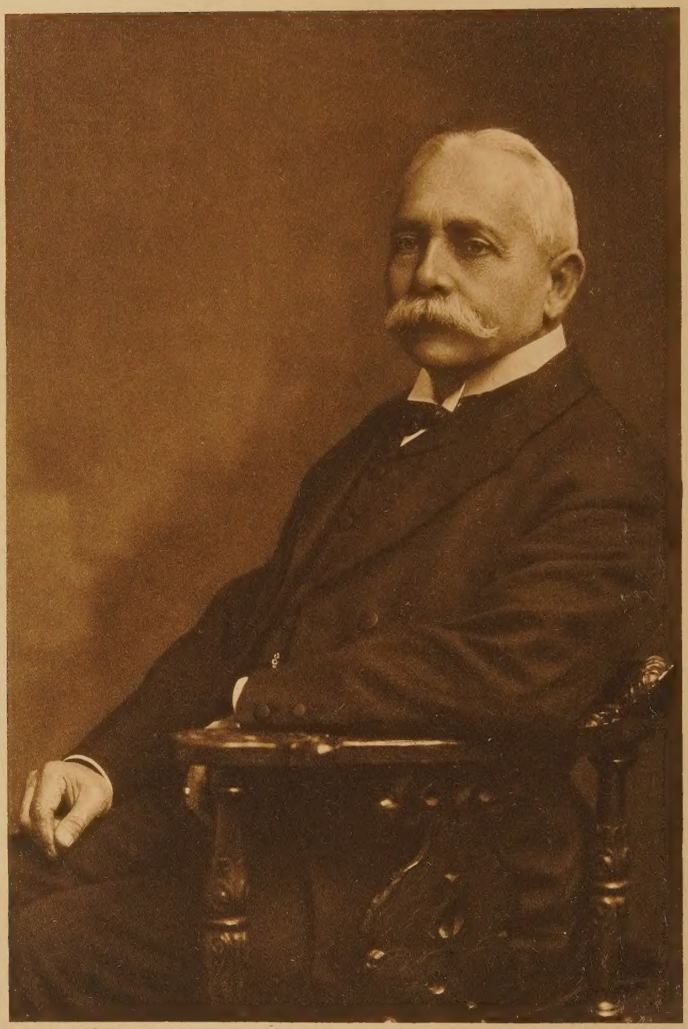
> Sitting, as it were, as an international, as well as a domestic tribunal, we apply Federal Law, State Law, and International Law, as the exigencies of the particular case may demand.

The cases collected are so numerous and interesting, that it is only possible in this brief review to mention a few of the subjects dealt with—e.g. in Abelman *v.* Booth, where Booth was arrested under a warrant of the U.S. Court in Wisconsin for aiding and abetting in the escape of a fugitive slave, and he had procured his discharge upon habeas corpus by the State Court, it was held that it was the duty of the U.S. Marshal not to obey the process of the State Court, but to execute the process of the Federal Court.

In a controversy between two States as to the title to land, it was held that an Act of the State Legislature, divesting one person of his property and vesting it in another, at a fixed compensation, is contrary to the U.S. Constitution and void. Other cases hold that: a subsidiary Government like Porto Rico cannot be sued without its consent; a State of the Union is immune from suit as any nation is; the voluntary appearance of a State waives the privilege of immunity; a State may be sued by a citizen of another State and judgment may be entered in default of appearance, but a State cannot without its consent be sued by one of its own citizens; the Court has power to settle the boundary line between two States in an action brought for that purpose by one against the other; mandamus does not lie to compel one State to deliver up a fugitive from justice held by another State; a State may sue the United States to recover moneys received by the latter from sales of State lands; one State may sue another to restrain the latter from permitting sewage to be discharged or drained into channels or rivers within the territory of the former; a State which has taken the control of the sale of liquor is held to engage in ordinary private business, and is subject to a liquor tax imposed by the U.S. Government; a State may acquire a right by prescription in land forming the bank of a river in like manner as a private citizen; under Article 11 of the Amendment to the Constitution, a State cannot be prosecuted without its consent by a citizen of another State. And the latter State, as such, cannot, on behalf of one of its citizens, sue the former State to enforce the citizen's claim.

The general plan of the work is to include cases involving the Judicial power of the Constitution, and its relation to the Legislative and Executive power of the U.S.; Law and Equity; Admiralty and maritime jurisdiction; International Law; immunity of Nations and of States from suit; suits by individuals against States; controversies between States.

J. A. B.



The Hon. Sir J. G. Kotzé.